(24,652)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1915.

## No. 420.

KNAUTH, NACHOD & KUHNE, PETITIONERS,

*vs.*

LATHAM & COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*a* UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Friday, November 20th, A. D. 1914, at New Orleans, Louisiana, before the Honorable Don A. Pardee, Circuit Judge, and the Honorable Thomas S. Maxey and the Honorable Rufus E. Foster, District Judges.

KNAUTH, NACHOD & KUHNE, Appellants,
versus
LATHAM & COMPANY and Others, Appellees.

*b* Be it remembered, that heretofore, to-wit, on the 22nd day of May, A. D. 1914, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Alabama, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2651, as follows:

*c* U. S. Circuit Court of Appeals. Filed May 22, 1914. Frank H. Mortimer, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
against
LATHAM & COMPANY and Others, Appellees.

RECORD ON APPEAL.

Stevens, McCorvey & Dean, Solicitors for Knauth, Nachod & Kuhne, 503 City Bank Building, Mobile, Ala.

Briesen & Knauth, Counsel for Knauth, Nachod & Kuhne, 25 Broad Street, New York, N. Y.

Howe, Fenner, Spencer & Cocke, 708 Union Street, New Orleans, La., Solicitors for Latham & Company and American Surety Company.

Percy, Benners & Burr, Birmingham, Ala.; Rich & Hamilton, Mobile, Ala., Solicitors for Receivers and Trustees.

d *The Present Appeal.*

After the decision of the United States Circuit Court of Appeals for the Fifth Circuit on the former appeal (200 Fed. Rep., 403), the Appellees, Latham & Company and the Receivers and Trustee and the American Surety Company of New York, filed their respective motions to dismiss the cross-bill, or whatever it should be denominated, of the appellants Knauth, Nachod & Kuhne. Said motions were entertained by the District Court and finally granted and said bill dismissed both for want of jurisdiction and for want of equity. The decree was entered January 24, 1914, and Knauth, Nachod & Kuhne have appealed. The following is a copy of the record on this appeal and the first 138 pages thereof are the same as on the former appeal.

1 *Name of Court, Number and Style of Cause, and Names of Parties, etc.*

Circuit Court of the United States for the Southern District of Alabama, at Mobile, Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson

vs.

LATHAM & COMPANY and Others, Original Complainants and Defendants under the Original Bill of Complaint Herein.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupts,

vs.

LATHAM & COMPANY, Complainant and Defendant under the Supplemental Bill Filed Herein.

KNAUTH, NACHOD & KUHNE et al.

vs.

LATHAM & COMPANY et al., Cross Complainants and Cross Defendants under the Original Cross Bill and Amended Cross Bill Filed Herein.

Said Knauth, Nachod & Kuhne on July 1, 1910, filed herein answer to the original bill of complaint as amended, and by leave of the court on said date per order duly entered herein filed
2 their cross bill. On December 20, 1910, said Knauth, Nachod & Kuhne, by leave of the court per order duly entered filed an amended cross bill. On March 21, 1911, the court made a decree herein striking out and from the file the answer filed by said Knauth, Nachod & Kuhne to the original bill as amended, and striking out

and from the file the cross bill and amended cross bill filed herein by them. From said decree Knauth, Nachod & Kuhne have sued out an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and the following is the transcript of the record and proceedings in the cause sent up on said appeal.

*Original Bill of Complaint and Exhibits.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Co., Bankrupts, and Joe T. Gibson, Complainants,
vs.
LATHAM & Co., a Partnership, et al., Respondents.

To the Honorable Judges of the United States Circuit Court in and for the Fifth Circuit, Southern District of Alabama:

Clarence E. Frost and W. S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson, a resident of the Northern District of Alabama, as an unsecured creditor of said Knight, Yancey & Company, bankrupts, for himself and all other creditors who may become or make themselves parties to this proceeding, bring this, their bill of complaint, against Knight, Yancey & Company, a partnership, composed of J. W. Knight, residing at Decatur, Alabama, W. J. Yancey, residing at Memphis, Tennessee, R. H. Nesbit, residing at Spartanburg, South Carolina, and W. D. Nesbit, residing at Birmingham, Alabama, and Latham & Company, a partnership, the names of the partners composing the same being unknown to these complainants except that of Edmond
3 Latham and Pierre Walther, all of whom reside at Havre, in the republic of France, the said Pierre Walther, Edmond Latham, the steamship "Meltonian" now in the navigable waters of the Mobile river at Mobile, Alabama, Arthur Parker as master of the steamship "Meltonian," whose residence is unknown to these complainants but who is a non-resident of the State of Alabama, Frederick Leyland Steamship Company, Ltd., 1905, of Liverpool, a corporation organized and domiciled outside of the State of Alabama, Elder-Dempster & Co., a partnership, the names and residences of the partners composing which are unknown to these complainants, and the Louisville & Nashville Railroad Company, a corporation organized under the laws of the State of Kentucky and doing business in Mobile county, in the State of Alabama, and elsewhere, including the city of Pensacola in the county of Escambia, in the State of Florida, respondents, and show as the basis for the relief hereinafter prayed the following state of facts:

First.

That all of the individual parties complainant and respondent above named are over twenty-one years of age and their places of residence are as above stated; that on, to-wit, April 21, 1910, the above named Knight, Yancey & Company, a partnership composed as aforesaid, were duly adjudicated bankrupts by order of the District Court of the United States for the Northern District of Alabama, Northeastern Division, pursuant to a petition pending in said court for the adjudication of said partnership to be a bankrupt pursuant to the acts of congress relating to bankruptcy, and that the administration of said bankrupt estate is proceeding in said court; that thereafter on, to-wit, April 21, 1910, complainants Clarence E. Frost and W. S. Lovell were by order of said court, duly made and entered, appointed receivers of the estate of said bankrupts, a copy of which said order is hereto attached as Exhibit "A" and prayed to be taken as a part of this bill; that pursuant to their said appointment complainants qualified as such receivers and entered into bonds in the aggregate sum of two hundred thousand dollars ($200,000.00), as required by the order of said court, and that said complainants have entered upon the discharge of their duties as such receivers and have been and are now actively engaged in the discharge of their
4 duties as such in the effort to collect whole and preserved the estate of said bankrupts. Orators further allege that at the time said Knight, Yancey & Company were adjudicated bankrupts, as herein before alleged, said Knight, Yancey & Company were indebted to your orator, Joe T. Gibson, in the sum of fifteen thousand dollars ($15,000.00) for cotton sold and delivered to said Knight, Yancey & Company, which said debt due to orator Joe T. Gibson is still due and unpaid and wholly unsecured.

Second.

Your orators further show to the court that said Knight, Yancey & Company were, prior to the adjudication of bankruptcy aforesaid, largely engaged in the purchase of cotton at various points in the cotton producing sections of the United States and exporting said cotton to various ports in foreign countries; that the principal office and place of business of said Knight, Yancey & Company was at Decatur, Alabama; that said Knight, Yancey & Company having become involved in financial difficulties issued a large number of forged and fraudulent bills of lading purporting to be for cotton actually shipped, among which forged and fraudulent bills of lading were bills of lading for, to-wit, seventy-eight hundred (7,800) bales of cotton, to which said bills of lading for said seventy-eight hundred bales of cotton drafts were attached, which drafts were drawn by Knight, Yancey & Company, and of which drafts said Latham & Company became the owners; complainants aver and charge that said drafts were for sums of money which approximated the market value of said seventy-eight hundred bales of cotton at the time the

same were drawn, and approximated in amount the sum of six hundred thousand dollars ($600,000.00); complainants aver and charge that by the purchase or acceptance of said drafts, to which said forged and fraudulent bills of lading were attached, Latham & Company became and were creditors of said Knight, Yancey & Company in a large sum of money, to-wit, the sum of six hundred thousand dollars ($600,000.00), and were such creditors on, to-wit, April 14, 1910, and on all other dates referred to in this bill; that on, to-wit, April 14, 1910, the said Pierre Walther, acting for said Latham & Company, demanded of said Knight, Yancey & Company the delivery to said Latham & Company of true and regular bills
5 of lading for, to-wit, the aggregate of seventy-eight hundred bales of cotton, in payment and satisfaction of the aforesaid indebtedness of said Knight, Yancey & Company to said Latham & Company; complainants charge that on said date, and all other dates mentioned in this bill, said Knight, Yancey & Company were insolvent and that on all of said dates said Latham & Company and said Pierre Walther had reasonable cause to believe that said Knight, Yancey & Company were insolvent; that on, to-wit, April 14, 1910, Knight, Yancey & Company transferred to Latham & Company, who were then creditors of said Knight, Yancey & Company, a portion of the property of said Knight, Yancey & Company, to-wit, seventy-eight hundred bales of cotton, in payment of said debt of Knight, Yancey & Company to Latham & Company, with the intent to prefer said Latham & Company over the other creditors of said Knight, Yancey & Company, and that the effect of said transfer will be to enable said Latham & Company to obtain a greater percentage upon their debt due them from said Knight, Yancey & Company than any other unsecured creditor of said Knight, Yancey & Company, and that said Latham & Company had reasonable cause to believe that by said transfer said bankrupts intended to prefer said Latham & Company over the other creditors of said bankrupts; that the transfer aforesaid was made by said Knight, Yancey & Company to said Latham & Company within four (4) months prior to the time said Knight, Yancey & Company were adjudicated bankrupts as aforesaid. Your orators are advised by counsel and therefore charge that said transfer of said seventy-eight hundred bales of cotton to said Latham & Company by said Knight, Yancey & Company was, under the acts of congress relating to bankruptcy, a preferential transfer which should be avoided and that said seventy-eight hundred bales of cotton or the value thereof in equity and good conscience belong to said bankrupt estate and should be administered for the benefit of the creditors of said bankrupts; your orators further charge that at the time said Knight, Yancey & Company were adjudicated bankrupts they were indebted to firms, persons and corporations who had no security for their debts, in a sum aggregating five million dollars ($5,000,000.00) or more.

## Third.

6 Your orators further charge and show that a large portion of said seventy-eight hundred bales of cotton, transferred to said Latham & Company by said Knight, Yancey & Company, have been concentrated at the port of Mobile and that the number of, to-wit, forty-two hundred (4,200) bales of such cotton have been or are now being stowed and loaded under bills of lading issued by Elder, Dempster & Co. to Knight, Yancey & Company as shippers consigning said cotton to the order of the shippers at Havre, France, "Notify Latham & Co." into the steamship "Meltonian" which is lying in the navigable waters of the Mobile river at Mobile, as aforesaid, and which steamship is owned by said Frederick Leyland Steamship Co., Ltd., 1905, of Liverpool, but in which said Elder-Dempster & Co. claim some right and interest to orators unknown; that the said stowing and loading of said ship is being rapidly completed and when so completed orators are informed and believe and upon such information and belief allege that said steamship will proceed at once to Havre, France, with said cotton for the purpose of their delivering the same to said Latham & Company; your orators are advised that if said cotton is permitted to be taken beyond the jurisdiction of the courts of the United States the same will become lost to the creditors of said bankrupt estate of Knight, Yancey & Company. Orators hereto attach as Exhibit "B," which they pray to be taken as a part of this bill, a table showing the identifying marks of said forty-two hundred bales of cotton which have been loaded or are now being loaded into said steamship "Meltonian" as aforesaid. Orators are further informed and therefore charge that a large part of said cotton has been loaded into said ship since the agents of the owners of said ship had actual knowledge of the fact that said Knight, Yancey & Company had been adjudged bankrupts.

## Fourth.

Your orators further charge and aver that said Latham & Company have caused to be assembled at Pensacola, Florida, an aggregate of, to-wit, thirty-seven hundred and two (3,702) bales of said cotton so preferentially transferred to Latham & Company by said Knight-Yancey & Company, a table showing the identifying marks of which thirty-seven hundred and two bales of cotton so assembled at Pensacola, Florida, is hereto attached as Exhibit "C" and is further
7 prayed to be taken as a part of this bill; your Orators further charge that said thirty-seven hundred and two bales of cotton at Pensacola, Florida, are in the possession of the respondent Louisville & Nashville Railroad Company; your Orators further charge and aver that it is the purpose of said Latham & Company at once to remove said thirty-seven hundred and two bales of cotton from without the jurisdiction of the courts of the United States and ship the same to the port of Havre, France, or to some other foreign port, and that if so shipped said cotton and the value thereof will be lost to said bankrupt estate to which in equity and good conscience the same belong.

## Fifth.

Orators further aver and show that by said order of said District Court for the Northeastern Division of the Northern District of Alabama appointing them Receivers as aforesaid they were empowered to sue for and recover the assets of said bankrupt estate wherever the same might be situated, and your orators further show that on, to-wit, April 23, 1910, they applied to said District Court for the Northeastern Division of the Northern District of Alabama for express direction and authority to institute this suit, a copy of which application is hereto attached as Exhibit "D" and prayed to be taken as a part of this bill; that on, to-wit, April 23, 1910, by the order of the Honorable William I. Grubb, Judge of the District Court for the Northeastern Division of the Northern District of Alabama, your Orators were expressly authorized, directed and empowered to institute this suit; a copy of said last mentioned order is hereto attached as Exhibit "E" and prayed to be taken as a part hereof.

## Sixth.

Your orators submit themselves to the jurisdiction of this court and offer to do equity and to perform any and all conditions that the Court may impose for the granting of the relief herein prayed or any part thereof.

## Seventh.

Your orators further charge and aver that in order to prevent the removal of said cotton so transferred by said Knight-Yancey
8 & Company to said Latham & Company from beyond the jurisdiction of the courts of the United States, and in order to compel the respondents Latham & Company, Elder-Dempster & Company, Frederick Leyland Steamship Company, Ltd., 1905, of Liverpool, to answer this bill it is necessary that the same should be seized under the orders of this court and held within the jurisdiction of this court pending the final hearing of this bill.

The premises considered, your orators pray that this court will take jurisdiction of this their bill and will make parties respondent hereto said Knight, Yancey & Company, a partnership as aforesaid, said Latham & Company, and Edmond Latham and Pierre Walther, partners of said firm, said Arthur Parker as master aforesaid, said Frederick Leyland Steamship Company, Ltd., 1905, of Liverpool, a corporation as aforesaid, said J. W. Knight, W. J. Yancey, W. D. Nesbit and R. H. Nesbit, Elder-Dempster & Company, and said Louisville & Nashville Railroad Company, a corporation aforesaid; that the subpœnas of this court issue to said parties respondent and that the same may be served upon such of them as may be found within the jurisdiction of this court, and that as to such of said respondents as are without the jurisdiction of this court publication may be made citing them to appear and defend this bill as required by the orders of this court.

Orators further pray that the transfer by said Knight-Yancey & Company to said Latham & Company of said seventy-eight hundred bales of cotton be held and declared to be a preferential transfer and void within the meaning of the Acts of Congress relating to Ban-ruptcy, and the said Latham & Company be required on the final hearing hereof to deliver said cotton to your Orators or to account to them for the value of the same; that this Court's writ of injunction issue, restraining and enjoining, pending the final hearing of this bill, the said Latham & Company and the partners composing said firm, said Pierre Walthers, Edmond Latham, said Arthur Parker as Master of the Steamship "Meltonian," said Louisville & Nashville Railroad Company, said Frederick Leyland Steamship Company, Ltd., 1905, of Liverpool, and the said Elder-Dempster & Company, their agents, servants, attorneys and employees, and all other persons from removing any part of said cotton which
9 is now within the jurisdiction of this court; that in aid of this suit and to compel said non-resident respondents to answer this bill, the Marshal of this District be directed to seize, attach and sequester any part of said seventy-eight hundred bales of cotton so transferred to said Latham & Company by said Knight-Yancey & Company which may be found within this district, and that he be particularly directed to seize and cause to be unloaded such portion of said forty-two hundred bales of cotton, shown by Exhibit "B" hereto attached, or consigned by said bankrupts to Latham & Company, and the same to hold pending the further orders of this court, and that he be likewise directed to seize any portion of said forty-two hundred bales of cotton, shown by said Exhibit, and all other cotton consigned by said bankrupts to Latham & Company, which is within this district which has not been loaded into said Steamship "Meltonian" and the same to hold pending the further orders of this Court; that the said Louisville & Nashville Railroad Company be enjoined from removing or disposing of any part of said thirty-seven hundred and two bales of cotton in its possession at Pensacola, Florida, and all other cotton consigned by said bankrupts to Latham & Company, until the further orders of this court and that it be directed to deliver the same to whomsoever this court may designate for the purpose of receiving the same and holding the same pending the final hearing of this bill; that the said Arthur Parker, as Master aforesaid, be required by the order of this court to permit the unloading of such cotton as may have been loaded into the said ship, and the removal of it by the Marshal as aforesaid, and be enjoined from causing said vessel to sail until said cotton has been unloaded; and they pray for such other, further and general relief as in equity and good conscience they may be entitled to.

W. S. LOVELL,
CLARENCE E. FROST,
*Receivers in Bankruptcy of Knight, Yancey & Company.*
JOE T. GIBSON,
By PERCY, BENNERS & BURR, *Att'ys.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,
SANDERS, DE FOUR & DE FOUR,
*Solicitors for said Complainants.*

10 FOOT-NOTE.—Respondents are each required to answer the foregoing bill from paragraphs one to seven, both inclusive, but not under oath.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
SANDERS, DE FOUR & DE FOUR,
*Solicitors for Complainants.*

STATE OF ALABAMA,
*Mobile County:*

W. S. Lovell being duly sworn deposes and says, that he is one of the complainants to the foregoing bill and that the averments of said bill are true as therein stated.

W. S. LOVELL.

Subscribed and sworn to before me this the 29th day of April, A. D. 1910.

HELEN H. SMITH,
*Notary Public, Mobile Co., Ala.*

EXHIBIT "A."

In the District Court of the United States for the Northern District of Alabama.

In Bankruptcy.

In re KNIGHT, YANCEY & COMPANY, a Partnership, Bankrupt.

This cause coming on to be heard upon the application for the appointment of a receiver of the said Knight, Yancey & Company, and it appearing that the said partnership of Knight, Yancey & Company has been by the order of this court adjudged bankrupt, and the petitions being presented to the court, and certain creditors of the bankrupt appearing by counsel and urging the appointment of a receiver at this time, and there being no one opposing the granting of this order; on consideration whereof

11 It is ordered, adjudged and decreed that the application for a receiver of said bankrupt and its estate be, and the same is hereby granted.

And it appearing to the court that Clarence E. Frost, of Athens, Alabama, and Willim S. Lovell, of Birmingham, Alabama, are suitable persons to act as receivers in this cause:

It is ordered, adjudged and decreed that the said Clarence E. Frost and the said William S. Lovell be and they are hereby appointed receivers of the said Knight, Yancey & Company, bankrupts, and they are hereby authorized and empowered and instructed to take possession of all the estate, property and assets of said bankrupts wheresoever found, including choses in action, and all books and

papers of said bankrupt, and the same to safely keep and hold subject to the orders of this court.

And it being represented to the court that a large part of said estate consists of cotton on which insurance should be carried:

It is ordered that said receivers be, and they hereby are authorized to effect and carry insurance on such cotton of said estate as in their judgment should be carried.

And it being further represented that the property of the estate is widely scattered and that it had branch offices at one or more places in Alabama, and elsewhere,

It is further ordered that the said receivers be, and they are hereby authorized and empowered to go to such reasonable expense as may be proper to ascertain, locate and secure possession of any property and assets of said bankrupt and to employ such counsel and agents, clerks and other employees as may be reasonably necessary to enable such receivers to ascertain, locate and secure the possession of the books, papers, properties or other estate of said bankrupt.

And the said receivers are further authorized and empowered to collect all debts and claims due to said bankrupt, and they are further authorized and empowered to institute and prosecute such suits, actions and all other proceedings at law and in equity as they may be, by counsel, advised, and which in the judgment of the receivers, should be instituted and prosecuted in their names as receivers; to properly protect or conserve the interests of said estate, or its creditors,

And it being made to appear to the court that certain cotton, or cotton warehouse receipts, of said partnership have been hy-
12 pothecated as security for debts, and that the same were deposited as security for debts, and that the same were deposited as security with the understanding or agreement that the said cotton or receipts would be sold upon the order of said partnership; and it appearing to the court that it may be to the interest of said estate and its creditors to vest in the receivers power and authority to order out part or parts of said cotton or receipts where in special cases the same should be done:

It is further ordered that said receivers be, and they are hereby fully authorized and empowered, in special cases, where in their judgment, the best interests of the estate and its creditors will be subserved thereby to order the sale of any cotton, or cotton receipts at the then market price therefor, which may have been hypothecated, or pledged, by said partnership, or be held by creditors as security for a bona fide indebtedness, and thereby to conserve the equity or equities of said partnership or the bankrupt estate in such cotton or cotton receipts, and in proper cases they may in order to effect such sales recognize the validity of the claims of a party or parties holding said cotton or cotton receipts, or any part or parts thereof.

It is further ordered that any and all creditors of said partnership who hold cotton or cotton receipts or collaterals be, and they are restrained from the selling of the same until or unless they give said receivers or one of them at least three days' notice of the purpose to sell, and of the time and place of sale.

It is further ordered that before entering upon the discharge of their duties said receivers shall make and enter into bond, conditioned and payable as provided by law, in the sum of two hundred thousand dollars, with surety or sureties to be approved by the judge or clerk of this court.

And said receivers may file a joint bond in said sum, or they may, at their election make and file separate bonds each in the sum of one hundred thousand dollars, conditioned and payable and with surety to be approved as aforesaid.

And upon the filing of said joint bond or said separate bonds, and the approval thereof, as aforesaid, said receivers are fully authorized hereby to enter upon the discharge of their duties with all the rights, powers and authority in this order given them.

13 And it is further ordered that all managers, agents, and employees of said partnership whether at its general office or any local or branch office, or agency of said Knight, Yancey & Company, and all persons holding or in possession of any of the books, papers, property, estate or effects of said partnership be, and they are hereby ordered to deliver possession of same to said receivers on demand.

Done in open court, this 21st day of April, 1910.

(Sig.) W. I. GRUBB,
*United States District Judge.*

No. 1665.

UNITED STATES OF AMERICA,
*Northern District of Alabama, Northeastern Division:*

I, Charles J. Allison, clerk of the District Court of the United States of America in and for said Division of said District, do hereby certify that the foregoing is a true, full, and complete copy of the order made by W. I. Grubb, judge of said court, appointing Clarence E. Frost of Athens, Ala., and William S. Lovell of Birmingham, Ala., receivers of the estate of Knight, Yancey & Co., in bankruptcy as fully as the same does appear of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at office in the city of Huntsville, in said District, this 21st day of April, 1910.

[SEAL.] CHAS. J. ALLISON,
*Clerk of the U. S. District Court.*

EXHIBIT "B."

Shipped to Order Notify Latham & Co., Havre, France, per S. S. "Meltonian," by Knight, Yancey & Co.

| | | |
|---|---|---|
| 1910. | | |
| | 100 | R S E R |
| | 100 | Q S H O |
| 14 | 100 | R S O T |
| | 100 | Q S A N |
| | 100 | P S R I |
| | 100 | R S E N |
| | 100 | R S N I |
| | 100 | Q S A D |
| | 100 | Q S D W |
| | 100 | P S O A |
| | 100 | Q S U S |
| | 100 | P S K O |
| | 100 | P S O P |
| | 100 | P S E V |
| | 100 | P S I Z |
| | 100 | P S O L |
| | 100 | P S B A |
| | 100 | P S F A |
| | 100 | P S G E |
| | 100 | P S E N |
| | 100 | P S O G |
| | 100 | R S X A |
| | 100 | R S N U |
| | 100 | Q S O T |
| | 100 | R S L X |
| | 100 | Q S G Q |
| | 100 | Q S Y T |
| | 100 | Q S E L |
| | 100 | P S D Y |
| | 100 | P S E X |
| | 100 | P S C A |
| | 100 | P S P L |
| | 100 | Q S O N |
| | 100 | Q S O H |
| | 100 | Q S M E |
| | 100 | P S E A |
| | 100 | P S S E |
| | 100 | P S D A |
| | 100 | P S T W |
| | 100 | P S L I |
| | 100 | Q S D C |
| | 100 | R S I A |
| | 4,200 | bales. |

15

## Exhibit "C."

Latham Cotton Held by L. & N. on Through Bills Lading at Pensacola and which Knight Gave Them for Bogus Bills.

| | | | |
|---|---|---|---|
| R S D I | 50 | R S S B | 75 |
| R S R E | 50 | R S I C | 15 |
| Q F A B | 85 | R S A T | 100 |
| Q S C P | 75 | R S I C | 85 |
| Q S L A | 75 | Q S G C | 60 |
| Q S T R | 40 | P Z L U | 70 |
| Q S S C | 50 | P R I K | 80 |
| Q S I A | 50 | Q S L L | 15 |
| Q A R I | 85 | Q S T R | 60 |
| Q S A T | 75 | P L E N | 65 |
| Q S G C | 40 | P U R X | 85 |
| Q M C E | 65 | P I N S | 85 |
| R S O M | 80 | P S H E | 80 |
| R S C I | 50 | R S D I | 50 |
| R S C I | 50 | R S L W | 50 |
| Q S L L | 42 | R S L W | 50 |
| | 962 | | 1,025 |
| | | | 962 |
| | | | 1,987 |

| | | |
|---|---|---|
| | PALS | 23 |
| PINT or | PENT | 40 |
| | OPRA | 15 |
| | POST | 50 |
| | OATS | 81 |
| | PLAT | 54 |
| | FUME | 59 |
| | OURY | 46 |
| | PILL | 9 |
| | FUSE | 57 |
| | KYC | 2 |
| | XX | 29 |
| | | 465 |

| | |
|---|---|
| R S P Z | 100 |
| R S C O | 100 |

16

| | |
|---|---|
| R S M X | 100 |
| R S E A | 100 |
| Q S I Y | 100 |
| R S P E | 100 |
| | 600 |

| | |
|---|---|
| R S B L | 100 |
| Q S U R | 100 |
| Q S A T | 25 |
| Q N C E | 20 |
| Q S L L | 15 |
| R S O M | 20 |
| Q S T R | 60 |
| R S R E | 50 |
| Q S A T | |
| B | 100 |
| P S H E | 20 |
| P R I K | 20 |
| P W A L | 100 |
| | 650 |

EXHIBIT "D."

In the District Court of the United States for the Southern District of Alabama, Northeastern Division

In the Matter of KNIGHT, YANCEY & COMPANY, Bankrupts. In Bankruptcy.

*Petition of Receivers.*

To the Honorable William I. Grubb, Judge of said Court:

Your petitioners, C. E. Frost and W. S. Lovell, receivers in bankruptcy of said bankrupt, show to the court the following state of facts:

First.

17 Your petitioners are informed and believe, and upon such information state that the bankrupt was on, to-wit, April 16th, 1910, indebted to Latham & Company, a partnership doing business in Havre, France, in a sum in excess of three hundred thousand dollars ($300,000.00) and had been so indebted for more than sixty days; that on said date, to-wit, April 16th, 1910, said bankrupt was insolvent, which fact was known to it, and that said Latham & Company had reasonable cause to believe that said Knight, Yancey & Company were insolvent; that on, to-wit April 16th, 1910, Knight, Yancey & Company transferred to said Latham & Company a portion of their property, to-wit, seven thousand eight hundred (7,800) bales of cotton, in payment and satisfaction of the aforesaid indebtedness of said bankrupt, to said Latham & Company, and that such transfer was made and received with intent to prefer both on the part of said bankrupt and said Latham & Company, said Latham & Company over the other creditors of said bankrupt.

These petitioners are advised, and, therefore, aver and charge that said cotton so transferred rightfully belongs to said bankrupt estate, and that these receivers should be empowered to recover the same.

Second.

Petitioners are informed and believe, and, therefore, state that said cotton had been loaded on board the ship Meltonian, at the port of Mobile, and that it is expected that said ship will sail on tomorrow, April 24th, 1910. Said Latham & Company have no property within the jurisdiction of this court, or within the United States, so far as petitioners are informed and believe and therefore, state — charge; and petitioners further show to the court that unless they are permitted to sue for, recover and receive said cotton, and to enjoin or restrain the removal of same, said cotton will be lost to said estate.

The premises considered, petitioners pray that they be authorized and empowered to take any steps and action that they may be advised is proper, outside of the jurisdiction of this court, for the purpose of preventing the removal of said cotton, and for the purpose of recovering the same, and particularly pray that they be authorized and directed to institute suit in the District Court of the United States for the Southern Division of Alabama, to set aside said
18 transfer and to recover said cotton, and to enjoin and restrain its removal from said port of Mobile, and for such other and further relief and orders in the premises as may be appropriate.

W. S. LOVELL,
C. E. FROST,
*Receivers in Bankruptcy of Knight, Yancey & Company,*
By PERCY, BENNERS & BURR,
*Their Attorneys.*

STATE OF ALABAMA,
*Jefferson County:*

Augustus Benners, being duly sworn, says that he is one of the attorneys for said receivers and is authorized to make this affidavit for them, and that the averments of the foregoing are true as therein stated.

AUGUSTUS BENNERS.

Subscribed and sworn to before me this April 23rd, 1910.
[SEAL.]
PAUL D. THOMAS,
*Notary Public.*

Endorsed: Filed April 23rd, 1910, at 4:20 p. m. Chas. J. Allison, Clerk.

A true copy.

CHAS. J. ALLISON,
*Clerk U. S. District Court.*

hold pending the sailing on her present voyage from the port of Mobile of the steamship Meltonian, and if said steamship shall not carry any portion of said sequestered cotton, then the clerk
21 of the court shall immediately pay the full sum aforesaid without deduction of any kind to the master of the said steamship Meltonian or his solicitors in full settlement of all claim for freight which the said steamship may have for and on account of the consignment of said cotton as cargo in said ship. If the said steamship Meltonian upon sailing aforesaid, shall carry a part but not all of said cotton, then the clerk shall pay out of said deposit, to said master of said steamship, or his solicitors, a sum ascertained by the number of pounds of cotton not carried by said steamship at the rate per cent per hundred pounds set forth in the bills of lading for said cotton not carried, and the balance or difference shall pay to complainants or their solicitors, and if said steamship upon sailing as aforesaid shall carry all of said cotton, then the clerk shall pay said entire sum to complainants or their solicitors of record.

Third.

This order and decree shall be without prejudice to complainants' right to apply for injunctive or other process under this bill directed to the Louisville & Nashville Railroad Company.

Fourth.

That defendants or any of them may release said cotton from said seizure when and if made, at any time thereafter upon furnishing and filing with the clerk a forthcoming bond with good and solvent security, approved by the court or the clerk thereof, in the sum of three hundred and twenty-five thousand ($325,000.00) dollars, conditioned, that if the obligors on said bond shall have forthcoming and deliver within sixty days from the date of any final decree of this court such cotton to the proper officers of the court, or shall pay and satisfy such decree as may be rendered in the cause, then the obligation to be null and void, otherwise to remain in full force and effect.

This cause is reserved for further orders and decrees.

Signed at 4 o'clock p. m. this May 3rd, 1910.

HARRY T. TOULMIN, *Judge.*

Filed and duly entered May 3, 1910.

RICHARD JONES, *Clerk.*

22 *Writ of Sequestration and Marshal's Return.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson
vs.
LATHAM & COMPANY and Others.

To the President of the United States, to the Marshal of said District or any of His Deputies, Greeting:

Pursuant to the decree rendered by this honorable court in this cause on May 3rd, A. D. 1910, you are hereby commanded to seize, attach, sequester and hold, pending the further orders of the court herein, the four thousand two hundred (4,200) bales of cotton stowed in the steamship Meltonian and on the wharf to be loaded into her hold consigned by Knight, Yancey & Company to the order of Knight, Yancey & Company at Havre, France, "Notify Latham & Company" under bills of lading issued by said steamship Meltonian, said cotton being further identified by the marks thereon described in Exhibit "B" to the bill of complaint herein, a copy of which exhibit is hereto attached.

All persons are hereby strictly enjoined from interference with or preventing said marshal from executing this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court of the United States for the Southern District of Alabama, this the 4th day of May, A. D. 1910.

[SEAL.]

RICHARD JONES, *Clerk.*

Shipped to Order Notify Latham & Co., Havre, France, per S. S. "Meltonian," by Knight, Yancey & Co.

| | | |
|---|---|---|
| | 100 | R S E R |
| | 100 | Q S H O |
| | 100 | R S O T |
| | 100 | Q S A N |
| | 100 | P S R I |
| 23 | 100 | R S E N |
| | 100 | R S N I |
| | 100 | Q S A D |
| | 100 | Q S D W |
| | 100 | P S O A |
| | 100 | Q S U S |
| | 100 | P S K O |
| | 100 | P S O P |
| | 100 | P S E V |
| | 100 | P S I Z |
| | 100 | P S O L |
| | 100 | P S B A |
| | 100 | P S F A |
| | 100 | P S G E |
| | 100 | P S E N |
| | 100 | P S O G |
| | 100 | R S X A |
| | 100 | R S N U |
| | 100 | Q S O T |
| | 100 | R S L X |
| | 100 | Q S G Q |
| | 100 | Q S Y T |
| | 100 | Q S E L |
| | 100 | P S D Y |
| | 100 | P S E X |
| | 100 | P S C A |
| | 100 | P S P L |
| | 100 | Q S O N |
| | 100 | Q S O H |
| | 100 | Q S M E |
| | 100 | P S E A |
| | 100 | P S S E |
| | 100 | P S D A |
| | 100 | P S T W |
| | 100 | R S L I |
| | 100 | Q S D C |
| | 100 | R S I A |

4,200 bales.

Received in office May 4, 1910, and executed May 4 to 9, 1910,
by taking into my custody the said 4,200 bales of cotton,
24 partly from the steamship Meltonian and part from the docks,
some of said cotton being in bad condition and marks indistinguishable.

G. B. DEANS,
*U. S. Marshal.*

Returned and filed May 9, 1910.

RICHARD JONES, *Clerk.*

*Notice to Arthur Parker of Amendment to Original Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers in Bankruptcy of Knight, Yancey & Co., Bankrupts, Complainants,
vs.
LATHAM & COMPANY, a Partnership, et als., Respondents.

To Messrs. Pillans, Hanaw & Pillans, Solicitors for Arthur Parker et als.:

We enclose herewith a copy of an amendment to the bill in the above styled case, pending in the Circuit Court of the United States, which will be proposed tomorrow morning at ten o'clock.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainants.*

We accept service of the foregoing this the fifth day of May, A. D. 1910.

PILLANS, HANAW & PILLANS,
*Solicitors for Arthur Parker, Master of the Steamship "Meltonian."*

Filed May 5, 1910.

RICHARD JONES, *Clerk.*

25 *Order Allowing Complainant- to Amend Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers in Bankruptcy of Knight, Yancey & Co., Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

The application of the complainants to amend their bill, filed herein, being presented to the court, and it appearing to the court that notice of such application has been given to all parties who have appeared in said cause:

It is ordered, adjudged and decreed that said amendment be and the same is hereby allowed.

May 5th, 1910.

HARRY T. TOULMIN,
*Judge Circuit Court of the United States for the Sou. Dist., Sou. Div. of Alabama.*

Filed and entered May 5, 1910.

RICHARD JONES, *Clerk.*

*Amendment to Original Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers in Bankruptcy of Knight, Yancey & Co., Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

Come the complainants and pray the leave of the court to amend their bill as follows: By adding a paragraph to be numbered four and a half, to be inserted between the fourth and fifth para-
26 graphs of the bill, which paragraph shall read as follows:

"Your orators are informed and believe and on such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7,800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of any such right, title or interest claimed in and to said seventy-eight hundred (7,800) bales of cotton is unknown to these complainants."

Complainants further pray leave to amend the prayer of their bill by adding at the end thereof the following:

"That all persons, firms or corporations who claim any right, title or interest in and to said seventy-eight hundred (7,800) bales of cotton be made parties defendants to this bill and be cited by publication to answer this bill."

CLARENCE E. FROST,
WM. S. LOVELL,
JOE T. GIBSON,
*Complainants,*
By RICH & HAMILTON.
PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainants.*

STATE OF ALABAMA,
*Mobile County:*

William S. Lovell being duly sworn doth depose and say that the averments of the foregoing amendment and of the bill as proposed to be amended are true as therein stated, and that he as receiver of Knight, Yancey & Company, bankrupts, is one of the parties complainant to the bill.

WILLIAM S. LOVELL.

Subscribed and sworn to before me this 5th day of May, 1910.
RICHARD JONES, JR.,
*Deputy Clerk.*

Filed by leave of the court May 5, 1910.
RICHARD JONES, *Clerk.*

27 *Motion of Complainant- to Modify Decree Directing Issuance of Writ of Sequestration.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers in Bankruptcy of Knight, Yancey & Co., Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

Come the complainants and move the court to modify the order made in this cause on May 3rd, 1910, by striking therefrom the fourth paragraph thereof.

WM. S. LOVELL,
CLARENCE E. FROST,
*Receivers in Bankruptcy of Knight, Yancey & Co.;*
JOE T. GIBSON,
*Complainants,*
By PERCY, BENNERS & BURR, *Att'ys.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,

To Messrs. Pillans, Hanaw & Pillans, Solicitors for Arthur Parker, Master of the Steamship "Meltonian":

Please take notice that the above motion will be presented to the court at 12 o'clock m. this 6th day of May, 1910.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainants.*

Filed May 6, 1910.

RICHARD JONES, *Clerk.*

28 *Decree Modifying Decree Directing Issuance of Writ of Sequestration.*

In the Circuit Court of the United States for the Southern Division of the Southern District of Alabama, Fifth Circuit.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,
vs.
LATHAM & COMPANY, a Partnership, et al., Respondents.

This cause coming on to be heard on the motion of the complainants filed herein this May 6th, 1910, for a modification of the decree of this court entered in said cause on May 3rd, 1910, upon consideration thereof, it is ordered, adjudged and decreed that the same be and it is hereby granted and said paragraph "Fourth" of said decree is hereby stricken therefrom, but without prejudice to the right of any person claiming an interest in the subject matter of the controversy to apply to the court for a release of the cotton involved in the suit from the custody of the marshal.

Made this May 6th, 1910, at 12:30 o'clock p. m.

HARRY T. TOULMIN, *Judge.*

Filed and entered May 6, 1910.

RICHARD JONES, *Clerk.*

*Petition of Latham & Company for Leave to Bond Cotton.*

Circuit Court of the United States, Fifth Circuit and Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,
vs.
LATHAM & COMPANY, a Partnership, et al., Respondents.

To the Honorable the Judges of the United States Circuit Court, Fifth Circuit and Southern District of Alabama:

The petition of Latham & Company, a partnership com-
29 posed of Edmond Latham, Charles Latham and Raoul

Latham, and domiciled in the city of Havre, republic of France, with respect represents:

That on or about April 29th, 1910, the plaintiffs above mentioned filed their bill of complaint against your petitioners and various other parties, whereby, among other relief, they prayed for the judicial sequestration of certain forty-two hundred (4,200) bales of cotton belonging to your petitioner and at that time situated in the city of Mobile, State of Alabama.

That in this cause, in pursuance of a decree made and entered by this honorable court on the 3rd day of May, 1910, the marshal of this district judicially sequestered and took into his possession said forty-two hundred bales of cotton belonging as aforesaid to your petitioners, and now holds same in his custody, and petitioners aver that they are owners of said cotton by purchase from Knight, Yancey & Co.

That your petitioners are entitled to and should be permitted to appear herein to bond and release said cotton, upon giving a bond properly conditioned and in a sum fixed by the court.

Wherefore, the premises considered, petitioners pray that, upon their furnishing bond with good and solvent surety satisfactory in amount and terms to this honorable court, the said sequestration be released and the marshal of this district be directed to deliver to your petitioners the said forty-two hundred bales of cotton belonging to your petitioners, at present in the custody of said marshal under said sequestration in the city of Mobile, numbered and marked as set forth in the exhibit attached to and made part of this petition, marked Exhibit "A"; and petitioners pray for such other and further orders as may be proper in the premises.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Co.*

UNITED STATES OF AMERICA,
*Southern District of Alabama:*

Walker B. Spencer, being duly sworn, deposes and says that he is a member of the firm of Howe, Fenner, Spencer & Cocke, solicitors for Latham & Company, defendant in the above entitled and numbered cause; that none of the members of said firm of Latham & Company are within the jurisdiction of this court; that he has read the foregoing petition and knows the contents thereof; that the matters therein stated are true except as to such matters as may be stated on information and belief, and as to those he believes it to be true.

W. B. SPENCER.

Sworn to and subscribed before me, this 14th day of May, 1910.

RICHARD JONES, JR.,
*Deputy Clerk.*

EXHIBIT "A."

List of Marks of Latham & Company's Cotton at Mobile for Havre.

*Custody Bills of Lading.*

| Number of bales. | Marks. |
|---|---|
| 100 | Q S U S |
| 100 | Q S A N |
| 100 | Q S D C |
| 100 | R S L I |
| 100 | R S I A |
| 100 | R S O T |
| 100 | R S N I |
| 100 | R S E R |
| 100 | P S I Z |
| 100 | P S O L |
| 100 | P S D Y |
| 100 | P S O G |
| 100 | P S E X |
| 100 | P S S E |
| 100 | P S C A |
| 100 | P S P L |
| 100 | Q S G Q |
| 100 | Q S X T |
| 100 | Q S E L |
| 100 | R S N U |
| 100 | R S L X |
| 100 | Q S Y T |

31 List of Marks of Latham & Company's Cotton at Mobile for Havre.

*Port Bills of Lading.*

| Number of bales. | Marks. |
|---|---|
| 100 | P S E V |
| 100 | P S E N |
| 100 | P S G E |
| 100 | P S O A |
| 100 | P S T W |
| 100 | P S R I |
| 100 | P S B A |
| 100 | P S O P |
| 100 | P S F A |
| 100 | P S K O |
| 100 | Q S O T |
| 100 | Q S H O |
| 100 | P S E A |
| 100 | P S D A |

| | |
|---|---|
| 100 | Q S D W |
| 100 | Q S A D |
| 100 | Q S M E |
| 100 | Q S O H |
| 100 | Q S O N |
| 100 | R S E N |
| 100 | R S X A |

Filed May 14, 1910.

RICHARD JONES, *Clerk.*

32 *Decree Permitting Latham & Company to Bond Cotton.*

Circuit Court of the United States for Southern District of Alabama.

In Equity. No. 279.

CHARLES E. FROST et al.
vs.
LATHAM & COMPANY et al.

This cause coming on to be heard this 14th day of May, 1910, on the petition of Latham & Company to be permitted to appear herein, to bond and release the certain forty-two hundred (4,200) bales of cotton sequestered in this cause, and claimed by them, and the court having heard the parties and upon consideration whereof,

It is now ordered, adjudged and decreed that petitioners, Latham & Company, be and they hereby are permitted to appear herein, to bond said forty-two hundred (4,200) bales of cotton sequestered in this cause, and now in the custody of the marshal.

It is further ordered, that, upon Latham & Company furnishing forthcoming bond, with surety satisfactory to the clerk of this court and to be approved by him, in the sum of three hundred and twenty-five thousand ($325,000.00) dollars, conditioned that said Latham & Company shall have forthcoming said cotton, within sixty days from the date of any final decree in this cause, to the proper officer of this court, or to pay and satisfy such decree as may be rendered in this cause, the marshal is hereby ordered to release and deliver said forty-two hundred bales of cotton sequestered in this cause, and now in his possession, to Latham & Company, their solicitors or their order.

It is further ordered that the cost of all warehouse charges, including the cost of stowage, and cost of delivery of and of insurance be paid by Latham & Company to be costs of court and to abide the final decree in this cause.

HARRY T. TOULMIN, *Judge.*

Filed and duly entered May 14th, 1910.

RICHARD JONES, *Clerk.*

33 *Bond of Latham & Company for Release of Cotton.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Co., Bankrupts, and JOE T. GIBSON, Complainants,
vs.
LATHAM & COMPANY, a Partnership, et als., Respondents.

Know all men by these presents, That we, Latham & Company, a co-partnership composed of Edmond Latham, Charles Latham, and Raoul Latham, of Havre, France, as principal, and American Surety Company, of New York, as surety, are firmly held and bound unto Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson, complainants in the above entitled cause, and such other persons as may become parties complainant therein, severally, in the sum of three hundred and twenty-five thousand ($325,000.00) dollars lawful money of the United States of America for payment of which well and truly to be made we bind ourselves, successors, administrators, executors and heirs, jointly and severally, firmly by these presents.

Thus done and signed in the city of Mobile, Alabama, this 14th day of May, 1910.

Now, the condition of this obligation is such, that, whereas in the above entitled and mentioned cause, the Honorable H. T. Toulmin, judge of said court, by an order or decree dated the 3rd day of May, 1910, caused to be issued out of said court a writ of sequestration ordering the marshal of this district to seize and take into his custody certain forty two hundred bales of cotton described in said writ, but by decree entered May 14, 1910, authorized the release and delivery thereof to Latham & Company upon the execution and delivery of a forthcoming bond in the sum aforesaid and said cotton has been so released and delivered to the principal on this obligation.

Now, therefore, if the obligors herein shall have forthcoming and deliver within sixty days from date of any final decree of this
34 court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises, then this obligation shall be null and void, otherwise to remain in full force and effect.

LATHAM & COMPANY, [SEAL.]
By W. B. SPENCER, *Att'y of Record.*
AMERICAN SURETY CO. OF NEW YORK, [SEAL.]
By LLOYD D. BATRE, *Res. Vice Pres.*

[CORPORATE SEAL.]

Attest:
PALMER PILLANS,
*Res. Ass't Secretary.*

Approved this May 14th, 1910.
RICHARD JONES,
*Clerk U. S. Circuit Court.*

Filed this May 14th, 1910.
RICHARD JONES, *Clerk.*

*Notice to the Marshal to Release Cotton.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

CARENCE E. FROST et al.
vs.
LATHAM & COMPANY et al.

To the United States Marshal for said District:

Latham & Company having been permitted by the court to bond the 4,200 bales of cotton now held by you under the writ of sequestration issued herein on May 4th, 1910, and having made the bond required by the court for the release of said cotton, which bond is duly approved and filed herein, you are hereby notified to deliver said 4,200 bales of cotton to Latham & Company, their solicitors or their order.

Witness my hand and seal of said court, this May 14th, 1910.
RICHARD JONES, *Clerk.*

Received in office May 14, 1910, and executed by transferring to Latham & Company the warehouse receipts for the within 4,200 bales of cotton in pursuance of this notice, this May 14, 1910.
G. B. DEANS,
*U. S. Marshal.*

Filed May 14, 1910.
RICHARD JONES, *Clerk.*

35 *Demurrers by Latham & Co. to Bill of Complaint.*

In the Circuit Court of the United States, Fifth Circuit and Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et al., Respondents.

The joint and several demurrer- of Edmond Latham, Charles W. Latham and Raoul Latham, composing the co-partnership of Latham & Company, defendants, to the bill of complaint of Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson.

These defendants respectively, by protestation, not confessing or acknowledging any or all of the matters and things in the said plaintiffs' bill to be true in the manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

First.

That this honorable court is without jurisdiction ratione materiæ to hear and determine the matters and things in said bill alleged, or to grant the relief therein prayed for.

Second.

That the complainants, Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson, as creditor of said Knight, Yancey & Company, bankrupts, have no capacity, power or authority to institute, maintain or prosecute this suit in the form and for the matters and things therein alleged, nor to pray for or receive and have the relief in said bill prayed for.

Third.

That the said plaintiffs have not in and by said bill made or stated any such cause as does or ought to entitle them to any such
36 relief as is thereby sought and prayed for from or against these defendants.

Wherefore, these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Company, Defendants.*

STATE OF LOUISIANA,
*Parish of Orleans:*

Pierre Walther makes solemn oath and says: That he is the agent of the firm of Latham & Company, and authorized to make this affidavit; that none of the members of said firm are present in the United States; that the foregoing demurrer is not interposed for delay; and that same is true in point of fact.

PIERRE WALTHER.

Sworn to and subscribed before me, this 24th day of May, 1910.

PIERRE D. OLIVIER,
*Notary Public.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. B. SPENCER,
*Solicitor for the Defendants, Latham & Company.*

Filed May 25th, 1910.

RICHARD JONES, *Clerk.*

*Motion for Leave to File Supplemental Bill.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

Come the complainants, Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupt, and
37 Joe T. Gibson, an unsecured creditor of said bankrupt, and comes also William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, bankrupt, and show to the court:

That, on to-wit, May 26, 1910, the first meeting of the creditors of Knight, Yancey & Company, the bankrupt mentioned in the original bill of complaint in this cause, was held, and that at such meeting William S. Lovell was duly appointed the trustee in bankruptcy of said bankrupt.

The said William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, desires to be made sole complainant in the above styled cause, and to assume the prosecution thereof on behalf of all creditors of said bankrupt estate, and to assume all obligations and liabilities of the complainants in said cause, all of which the complainants in said cause are willing should be done.

Wherefore, the said Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupt, and the said Joe T. Gibson, an unsecured creditor of said bankrupt estate, 1st, move the court that said William S. Lovell be allowed and permitted to file his supplemental bill in said cause, of which a copy is hereto attached; 2nd, and move the court to substitute said William S. Lovell, as trustee, as aforesaid, for the original complainants in said cause as sole complainant therein; 3rd, and move the court to make and allow an order subjecting him, the said William S. Lovell, as trustee, as aforesaid, to all the liabilities and obligations in said cause of them, the said complainants; 4th, and further move the court to order that the said William S. Lovell may have the benefit of all orders and proceedings heretofore taken in said cause, and the benefit of the bond given in said cause by respondent, Latham & Company, to have forthcoming forty-two hundred bales of cotton mentioned in said bond.

Movants further show to the court that, as will appear by reference to the proceedings in said cause, the forty-two hundred bales of cotton mentioned in the original bill *was* seized under the orders of this court by the marshal of this district, and have since been released from such seizure and delivered into possession of respondent, Latham & Company; and further show to the court that no relief is desired in said cause by the complainants except against the respondent, Latham & Company.

38 5th. Wherefore, complainants move the court to dispense with the Louisville & Nashville Railroad Company, Elder, Dempster & Company, Frederick Leyland Steamship Company, Limited, 1905, of Liverpool, and Arthur Parker, master of said steamship Meltonian, the steamship Meltonian, Pierre Walther, J. W. Knight, W. D. Nesbitt, R. H. Nesbitt and W. J. Yancey as parties respondent to said cause; 6th, and further move the court to permit them to amend their said bill by striking out the following words in the introductory part of said bill, to-wit: "and Latham & Company, a partnership, and the names of the partners composing the same being unknown to these complainants, except that of Edmond Latham and Pierre Walther, all of whom reside at Havre, in the republic of France," and inserting in lieu thereof these words: "and Latham & Company, a partnership composed of Edmond Latham, Charles W. Latham and Raoul Latham, all of whom are citizens of the republic of France, and reside at Havre, France, at which place said partnership, Latham & Company, has its principal place of business"; and further to amend their bill by inserting a paragraph to be numbered 5½, which will appear between the end of the fifth and the beginning of the sixth paragraphs, to read as follows: "5½. The value of the matters in dispute in this cause, exclusive of interest and costs, exceeds the value of two thousand dollars."

Complainants show to the court that, at the time said original bill was filed, the names of the partners composing said partnership of Latham & Company were unknown to them, and the averment above proposed to be set forth as paragraph 5½ of the bill was omitted

therefrom through oversight, the substance of said averment appearing inferentially from the averments of the bill as originally framed.

JOE T. GIBSON,
By AUGUSTUS BENNERS,
*His Attorney.*
CLARENCE E. FROST,
*As Receiver in Bankruptcy of Knight, Yancey & Co., Bankrupts.*
WILLIAM S. LOVELL,
*As Receiver in Bankruptcy of Knight, Yancey & Company.*
WILLIAM S. LOVELL,
*As Trustee in Bankruptcy of Knight, Yancey & Company.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainants.*

39 STATE OF ALABAMA,
*Jefferson County:*

William S. Lovell being duly sworn deposes and says that the averments of fact contained in the above and foregoing are true.

WILLIAM S. LOVELL.

Subscribed and sworn to before me, this 23rd day of June, 1910.

DAVID B. ADAMS,
*Notary Public.*

Filed June 27, 1910.

RICHARD JONES, *Clerk.*

To Messrs. Howe, Fenner, Spencer & Cocke, Solicitors for Latham & Company:

You will please take notice that, on the next rule days, the attached motion and application will be presented to the Honorable Harry Toulmin, judge, at Mobile, Alabama.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainants.*

*Answer of Knauth, Nachod & Kuhne to Amended Bill of Complaint.*

In the Circuit Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

The defendants Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C.

Newton, Mary W. Knauth and Percival Kuhne, composing the co-partnership firm of Knauth, Nachod & Kuhne (impleaded as "persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7,800) bales of
40 cotton, or portions thereof, and that the names of such other persons are unknown to these complainants," by an amendment allowed by order entered on or about the 5th day of May, 1910), answer the amended bill of complaint herein as follows:

1. The said Knauth, Nachod & Kuhne are strangers to many of the matters and things alleged in said amended bill of complaint, and have no personal knowledge thereof, but for the purposes of this suit admit all of the allegations of said amended bill, except so far as the same are contrary to or inconsistent with the claim of the said Knauth, Nachod & Kuhne that they are the equitable owners, of the cotton or property or rights set forth in said amended bill, by title and right prior and paramount to the title or right of the receivers or of other creditors or of the trustee in bankruptcy of Knight, Yancey & Company, to the extent of 1,300 bales of cotton or to the amount of $98,005.58. So far as the allegations of said amended bill are inconsistent with or contrary to said claim they are denied.

2. The said Knauth, Nachod & Kuhne beg leave to refer to and make a part hereof their cross-bill filed herewith, as if the same were herein fully and at length set forth, as a statement of their said claim.

3. Under the circumstances and to avoid unnecessary prolixity, said Knauth, Nachod & Kuhne abstain from answering separately the allegations of the amended bill, but are willing to do so and will make such an answer if the court so direct.

Wherefore, the said Knauth, Nachod & Kuhne pray the judgment and decree or decrees of this court according to the prayer of their said cross-bill together with their reasonable costs and disbursements in the suit.

KNAUTH, NACHOD & KUHNE,
*Defendants Impleaded as Above Stated.*
STEVENS & LYONS,
*Solicitors and Counsel for Said Defendants,*
503 *City Bank Building, Mobile, Alabama.*
BRIESEN & KNAUTH,
*Of Counsel for Said Defendants,*
25 *Broad St., New York, N. Y.*

STATE OF NEW YORK,
*County of New York:*

Arend H. Weingardt, being duly sworn, says: That he is
41 a member of the firm of Knauth, Nachod & Kuhne and signed the foregoing answer in the name of his said firm; that the said defendants are co-partners pleading together, and that he is authorized to make and does make this verification on behalf of his co-partners as well as on behalf of himself; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein

stated to be alleged on information and belief and that as to those matters he believes it to be true.

AREND H. WEINGARDT.

Sworn to before me, this 27th day of June, 1910.

FRANK F. KIRKPATRICK,
[SEAL.] *Notary Public, New York County.*

Filed July 1, 1910.

RICHARD JONES, *Clerk.*

*Decree Allowing Knauth, Nachod & Kuhne to File Cross-bill.*

At a Regular Term of the Circuit Court of the United States Held in and for the Southern Division of the Southern District of Alabama, on the 1st Day of July, 1910.

Present: Hon. Harry T. Toulmin, District Judge.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

against

LATHAM & COMPANY, a Partnership, et al., Respondents.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the defendants Knauth, Nachod & Kuhne (impleaded as unknown persons by the amendment allowed to the bill of complaint by the order entered herein on the 5th day of May, 1910), be and they hereby are granted leave to file their cross-bill in this
42 cause; and that the same be filed and process issued according to the prayer thereof.

Dated this 1st day of July, 1910.

HARRY T. TOULMIN,
*District Judge Holding the Court.*

Filed and duly entered July 1, 1910.

RICHARD JONES, *Clerk.*

*Objections by Latham & Company to Granting Motion of Complainants for Leave to File Supplemental Bill, etc.*

In the Circuit Court of the United States, Fifth Circuit and Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et al., Respondents.

Now come Edmond Latham, Charles W. Latham and Raoul Latham, composing the co-partnership of Latham & Company, defendants herein, and object to the granting of the order asked for on the motion of Wm. S. Lovell filed herein, whereby, among other things, he prays leave to file a supplemental bill herein, to be substituted as party plaintiff for the original plaintiffs in said suit, and for the dismissal from said suit of said original plaintiffs, upon the following grounds, to-wit:

1. The original plaintiffs were without legal right or capacity to institute or maintain the bill filed by them herein, or to have the relief therein prayed for, and therefore Wm. S. Lovell, the trustee, cannot be substituted as a plaintiff by supplemental bill.

2. That the original bill herein did not state or show any right or cause of action in the original plaintiffs, and the trustee cannot, by supplemental bill, have himself substituted as plaintiff and state a cause of action.

43 3. That the court had no jurisdiction ratione materiæ of the matters and things in said original bill set forth.

4. That as respects this suit, there is no privity of title between said trustee and said complainants, and particularly between said trustee and Joe T. Gibson, one of the complainants, and therefore said trustee cannot be substituted for the parties plaintiff to the original bill.

5. That this court has no jurisdiction ratione materiæ to hear or determine the matters and things set forth in said proposed supplemental bill.

6. That as between the parties to said original bill, filing of said supplemental bill would cause a change of interest that would affect the interest between the parties, in that it would substitute in said suit in the stead of parties who had no right or cause of action a different party who has such right or cause of action in the matters and things in said original bill contained.

7. That the receivers in bankruptcy, parties plaintiff to said original bill, are still necessary parties to this suit, and have an interest therein, in view of the fact that if said suit is not maintained they are liable to damages for the wrongful seizure of defendants' property, and in no event can said Joe T. Gibson be dismissed.

Wherefore, for the reasons aforesaid, defendants pray that the relief prayed for in said motion be denied.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Co.*

Filed July 5, 1910.

RICHARD JONES, *Clerk.*

*Decree as to Service under Cross-bill of Knauth, Nachod & Kuhne, Directing Alias Subpœnas to Issue, etc.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM and Others, Defendants.

This cause came on to be heard at this term, and there-
44 upon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz:

1. That an alias subpœna ad respondendum be issued on the cross-bill of Knauth, Nachod & Kuhne (duly filed in the suit entitled Clarence E. Frost and W. S. Lovell, as receivers of the Knight, Yancey & Company, bankrupts, and Joe T. Gibson, complainants, vs. Latham & Company, et al., respondents), and be made returnable on or before the next rule day occurring after twenty days from the issuing thereof.

2. That said alias subpœna ad respondendum be delivered to the marshal of the Southern district of Alabama for service on Edmond Latham, Charles Latham, Raoul Latham, Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of the estate of Knight, Yancey & Company; Joe T. Gibson, and William S. Lovell, as trustee in bankruptcy of the estate of Knight, Yancey & Company, defendants named in said cross-bill; and that (in case they or any of them shall not be found in said district or shall not have voluntarily appeared thereto) service thereof be made on Messrs. Howe, Fenner, Spencer & Cocke, as solicitors in said original suit for said Edmond Latham, Charles Latham and Raoul Latham, and on Messrs. Rich & Hamilton, as the resident solicitors in said original suit for said receivers, for said Gibson and for said trustee.

3. That a duplicate of said alias subpœna ad respondendum be delivered to the marshal of the Northern District of Alabama for service on John W. Knight, at Decatur, Alabama, and William D. Nesbitt, of Birmingham, Alabama, both being defendants named in said cross-bill (provided that they or either of them shall not have voluntarily appeared thereto), and that service thereof be made personally on each of them who has not voluntarily appeared.

4. That another duplicate of said alias subpœna ad respon-dum be delivered to the marshal of the District of South Carolina for service on Robert H. Nesbitt, of Spartanburg, South Carolina, a defendant named in said cross-bill, (provided that he shall not have

voluntarily appeared thereto), and that service thereof be made on him personally.

5. That another duplicate of said alias subpœna ad respondendum be delivered to the marshal of the Western District of Tennessee for service on William J. Yancey, of Memphis, Tennessee, a defendant named in said cross-bill (provided that he shall not have voluntarily appeared thereto), and that service thereof be made on him personally.

5½. That in the event that Messrs. Howe, Fenner, Spencer & Cocke shall not be found within the Southern District of Alabama so that service may be effected upon Edmond Latham, Charles Latham, and Raoul Latham, through the said Howe, Fenner, Spencer & Cocke, as solicitors, then another duplicate of said alias subpœna ad respondendum be delivered to the marshal of the Eastern District of Louisiana for service on Howe, Fenner, Spencer & Cocke, as solicitors in said original suit for said Edmond Latham, Charles Latham and Raoul Latham, in all respects as ordered in the second paragraph of this order, and that service of said subpœna be made upon them personally.

6. That a copy of this order be served with said alias subpœna ad respondendum, if service thereof be made on said solicitors for said Edmond Latham, Charles Latham and Raoul Latham; that a copy of this order be also served with said alias subpœna ad respondendum, if service thereof be made on said solicitors for said receivers, for said Gibson and for said trustee; that a copy of this order be also served with said alias subpœna ad respondendum on said John W. Knight and on said William D. Nesbitt; that a copy of this order be also served with said alias subpœna ad respondendum on said Robert H. Nesbitt; and that a copy of this order be also served with said alias subpœna ad respondendum on said William J. Yancey.

7. That Edmond Latham, of Havre, France; Charles Latham, of Havre, France; Raoul Latham, of Havre, France; John W. Knight, of Decatur, Alabama; William J. Yancey, of Memphis, Tennessee; William D. Nesbitt, of Birmingham, Alabama; Robert H. Nesbitt, of Spartanburg, South Carolina; Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of the estate of Knight, Yancey & Company, bankrupts, appointed by the United States District Court for the Northern District of Alabama; and Joe T. Gibson, of the Northern District of Alabama; and William S. Lovell, as trustee in bankruptcy of the estate of Knight, Yancey & Company, appointed by the United States District Court for the Northern District of Alabama, all being the aforesaid defendants named, with others, in said cross-bill of Knauth, Nachod & Kuhne, be and each of them hereby is directed and required to appear, plead, answer, or demur to the said cross-bill on or before the return day of said alias subpœna ad respondendum, to-wit, by the 5th day of September, 1910.

Dated this 21st day of July, 1910.

HARRY T. TOULMIN,
*District Judge Holding the Court.*

Filed and entered July 21, 1910.

RICHARD JONES, *Clerk.*

*Opinion on the Motion for Leave to File Supplemental Bill, etc.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et al., Defendants.

Percy, Benners & Burr, Rich & Hamilton, Solicitors for Complainants; Howe, Fenner, Spencer & Cocke, Solicitors for Defendants.

Submitted on motion of William S. Lovell, as trustee in bankruptcy of said bankrupts, et al., for said trustee to be allowed to file a supplemental bill, etc., and objections thereto by defendants, Latham & Co., and also on demurrers filed by the defendants, Latham & Co., to the original bill in this cause.

TOULMIN, *District Judge:*

The grounds of objections by the defendants to this motion are, in substance, as follows:

1. That the original plaintiffs were without legal right or capacity to institute or maintain the bill filed by them herein, or to have the relief prayed for.

47 2. That the original bill herein did not state or show any right or cause of action in the original plaintiffs.

3. That this court has no jurisdiction of the matters and things in said original bill set forth.

4. That there is no privity of title between said trustee and said complainants, and particularly between said trustee and said Joe T. Gibson, one of the complainants.

5. That this court has no jurisdiction to hear and determine the matters and things set forth in said proposed supplemental bill.

6. That the filing of the supplemental bill would cause a change of interest in that it would substitute in said suit, instead of parties who had no right of action, a different party who has such right of action in the matters and things in said original bill contained.

7. That said receivers, parties plaintiff to said original bill, are still necessary parties to this suit.

It is well settled that receivers in bankruptcy have no legal right or capacity to maintain a suit of this character or to have the relief prayed for; and the writer, presiding in the district court for this district, so ruled in a suit of this character, brought by said receivers in that court. This court now holds that said receivers are not necessary or proper parties to this suit.

2. Section 64-*b* (2) of the Bankrupt Act clearly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property transferred by him either before or after filing of the petition wherein it provides that when such property shall have been recovered by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall be paid out of the bankrupt estate. While the language employed does not expressly vest in a creditor the right to bring suit to recover property, it implies that right to exist as clearly as language can do so. And it will be observed that the act makes no distinction as to the character of the transfer, whether it be one involving actual fraud—an intent to hinder, delay or defraud
48 the creditors of the bankrupt, which the law declares to be null and void—or a constructive fraud—"an act which the law declares to be fraudulent without inquiring into its motive."

McBroom vs. Turner & Rives, 1 Stew., 72.

A preferential transfer is a constructive fraud. It is one which to some extent hinders and delays creditors but is not necessarily, in and of itself, a fraudulent transfer. It is, however, "an infraction of that rule of equal distribution among all creditors which is the policy of the law to enforce when all cannot be fully paid."

Van Iderstein vs. Nat. Dis. Co., 174 Fed., 519.

So then it makes no difference whether the transfer be one of actual or of constructive and technical fraud, so far as the interest and rights of creditors are concerned. The effect of the transaction is the same. See also Section 70-*e*, Bankrupt Act.

"A trustee in bankruptcy represents all persons interested in the estate of the bankrupt."

In re Roth, 173 Fed., 597.

He is the representative of the creditors of the bankrupt, and if he in any given case would have the right as their representative to institute a suit to set aside fraudulent or preferential transfer, it seems to me, it follows as a necessary consequence, that such creditors are entitled to do so also, in the absence of a trustee, and to maintain the same until such trustee shall have been chosen, when he would be entitled to become a party plaintiff in the suit.

The court, in Fourth St. Nat. Bank vs. Millbourne Mills Co., 172 Fed., 177, said:

"Unless the rights of creditors are preserved and protected in some such way, bankruptcy, instead of being in their (creditors') interest, as supposed, is an actual disadvantage."

Where the transfer is made fraudulent or voidable by the bankrupt act as against creditors, and no trustee having been chosen, the creditors have the right themselves to take steps to avoid such transfer. "If this be so, any creditor would be entitled to sue on behalf of himself and others, either before or after institution of pro-
49 ceedings in bankruptcy, such suit, if after, being ancillary thereto, no trustee having yet been chosen."

Guarantee Title & Trust Co. vs. Pearlman, 144 Fed., 550; In re Schrom, 97 Fed., 760.

"Creditors may institute suits for the recovery of property fraudulently transferred."

Remington on Bankruptcy, Vol. 1, Sec. 399.

"To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy. It must be a plenary suit at law or in equity, according to the nature of the case. Such suit may be an action at law or suit in equity, as a bill to set aside a fraudulent conveyance."

Loveland on Bankruptcy (2nd Ed.), 608; Parker vs. Black, 151 Fed., 18.

The supreme court of the United States, in Bardes vs. Bank, 178 U. S., 524, employes language which indicates that the court regarded the payment to a creditor by a bankrupt in violation of the bankruptcy act as in the nature of a fraud, and that a remedy in equity would more readily afford adequate relief. In referring to the jurisdiction of the United States courts, the language employed includes suits "to set aside transfers of property to third parties alleged to be fraudulent as against creditors, including payments of money or property to preferred creditors."

The question of jurisdiction of the court is a question of the right of the court to determine, not of the principles to obtain in reaching a determination. If the bankrupt himself had brought this suit he could not be turned out of court on the question of jurisdiction. The authority of the court to decide as to his rights would be unquestioned. But he would be precluded in his right to relief by his own act of making a fraudulent or preferential transfer. He would be denied relief upon the principles of estoppel. Where the suit is by the trustee or by a creditor, a different result would follow. It is not a question of the determination to be reached but of jurisdiction to hear and make the determination.

Burnett vs. Morris Mer. Co., 91 Fed., 365.

50 In the absence of the amendment of February 5th, 1903, to the Bankrupt Act, the question involved in this suit must be determined either by the proper court of the state or by the Federal circuit court.

Hicks vs. Knost, 94 Fed., 625; Camp vs. Kellars, 94 Fed., 799.

Since said amendment of February 5th, 1903, the trustee may maintain a suit in the proper district court, as a court of bankruptcy, to set aside preferential transfers, and to recover the property transferred. The right to do so is exclusively in him so far as that court is concerned. The right to bring such suit in the bankruptcy court is given exclusively to the trustee. Said amendment does not take away, or in any manner limit the jurisdiction conferred by the bankrupt act on the circuit court of the United States and on the state courts.

The United States circuit courts have jurisdiction of suits at law and in equity between the trustee and adverse claimants, etc. Sections 23, 60-*b*, and 67-*e*, Bankrupt Act.

"A trustee in bankruptcy may at his election maintain a suit in equity to recover a payment by a bankrupt to a creditor as a voidable preference; such suit being in the nature of a creditor's suit to set aside a fraudulent conveyance."

Parker vs. Black, 151 Fed., 18; Pond vs. N. Y. Nat. Ex. Bk., 124 Fed., 992.

In Hull vs. Burr, 153 Fed., 951, the circuit court of appeals, 5th circuit, said:

"The trustee is vested by the Act with all the rights and title of the bankrupt, as well as with the rights of the bankrupt's creditors, and when he seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, state or federal, and is confined to the same remedies, subject to the exceptions made by the amendment of 1903." Under that amendment, as we have seen, the trustee may bring suit in the bankruptcy court to recover property fraudulently transferred by the bankrupt, whether the transfer be actually or constructively fraudulent—void or voidable—as to the bankrupt's creditors.

51 The allegations of the bill, if true, make a case of preferential transfer—one voidable as against creditors of the bankrupt. They have rights involved in the avoidance of the transfer. The trustee is vested with these rights, and when he seeks to enforce them it is in the interest, and for the benefit of said creditors. It seems to me that there is a "privity" of right between the trustee and said creditors, Joe T. Gibson being one of said creditors, and a complainant in this cause, in behalf of himself and all other creditors of said bankrupt who may become parties therein.

The demurrers to the original bill are overruled, and the objections to the motion of William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Co., et al., for leave to file a supplemental bill, etc., in this cause, are overruled, and said motion for leave to file an amended or supplemental bill, etc., is hereby granted. Let an order be entered accordingly.

Filed August 20, 1910.

RICHARD JONES, *Clerk.*

*Decree Overruling Demurrers to Original Bill, Granting Leave to File Supplemental Bill, etc.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST et al. and WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company,
vs.
LATHAM & COMPANY et al.

This cause coming on to be heard and being argued and submitted on the motion of the complainants and William S. Lovell as trustee in bankruptcy of Knight, Yancey & Company for leave to file a supplemental bill herein, etc., and the objections thereto filed by defendant Latham & Company; and also on demurrers filed by said defendants to the original bill, and the same being duly considered by the court, it is ordered, adjudged and decreed by the court that
52 said demurrers to the original bill herein be and the same are hereby overruled, and that said objections to said motion to file a supplemental bill, etc., be and the same are hereby overruled, and that said motion be and the same is hereby granted; and it is therefore, accordingly, further ordered, adjudged and decreed as follows:

1. That William S. Lovell as trustee in bankruptcy of Knight, Yancey & Company be and he is hereby allowed to file herein the supplemental bill presented with said motion,

2. That William S. Lovell as trustee in bankruptcy of Knight, Yancey & Company be and he is hereby substituted for the original complainants herein, and he is hereby made the sole complainant herein,

3. That William S. Lovell as such trustee and complainant be and he is hereby subjected to all the liabilities and obligations herein of the original complainants,

4. That William S. Lovell as such trustee and complainant herein may have the benefit of all orders and proceedings heretofore taken herein, and the benefit of the bond given herein by defendants Latham & Company to have forthcoming 4,200 bales of cotton mentioned in said bond.

5. That the cause be and the same is hereby dismissed as to defendants Louisville & Nashville Railroad Company, Elder, Dempster & Company, Frederick Leyland Steamship Company, Limited, 1905, Liverpool, Arthur Parker, master of steamship Meltonian, steamship Meltonian, Pierre Walther, J. W. Knight, W. D. Nesbitt, R. H. Nesbitt and W. J. Yancey,

6. That complainant herein is hereby allowed to amend the original bill herein by striking out the following words in the introductory part thereof, to-wit: "and Latham & Company, a partnership,

and the names of the partners composing the same being unknown to these complainants, except that of Edmond Latham and Pierre Walther, all of whom reside at Havre, in the republic of France," and inserting in lieu thereof the following: "and Latham & Company, a partnership composed of Edmond Latham, Charles W. Latham and Raoul Latham, all of whom are citizens of the republic of France, and reside at Havre, France, at which place said
53 partnership, Latham & Company, has its principal place of business;" and to further amend said bill by inserting between paragraphs 5 and 6 thereof a paragraph to be numbered 5½ to read as follows: "The value of the matter in dispute in this cause, exclusive of interest and costs, exceeds the value of two thousand dollars."

It is further ordered, adjudged and decreed that defendants Latham & Company and the partners composing said firm be and they are hereby required to answer the original bill herein as amended and the supplemental bill on or before October 1, 1910.

Made this August 20th, A. D. 1910.

HARRY T. TOULMIN, *Judge.*

Filed and entered August 20, 1910.

RICHARD JONES, *Clerk.*

*Supplemental Bill of Complaint and Exhibit Thereto.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama, Southern Division.

No. 279. In Equity.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Respondents.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupt, Complainant,

vs.

LATHAM & COMPANY, a Partnership, Respondents.

To the Honorable Judges of the Circuit Court of the United States for the Fifth Circuit, Southern District of Alabama, Southern Division:

Comes William S. Lovell, as trustee in bankruptcy of
54 Knight, Yancey & Company, bankrupt, and exhibits this his supplemental bill against Latham & Company, a partnership, this supplemental bill being exhibited in that certain cause in equity numbered 279, pending in the circuit court of the United States for the Fifth Circuit, Southern District of Alabama, Southern Division, wherein Clarence E. Frost and William S. Lovell, as receivers of

Knight, Yancey & Company, bankrupt, and Joe T. Gibson, are complainants, and Latham & Company, a partnership, and others are respondents, and shows to the court:

1st. That the complainant, William S. Lovell, is a citizen of the state of Alabama, and resides in the city of Birmingham in said state; that the respondent, Latham & Company, is a partnership composed of Edmond Latham, Charles W. Latham and Raoul Latham, all of whom are citizens of the republic of France, and reside in Havre, France, at which place said Latham & Company has its principal place of business; that Knight, Yancey & Company was a partnership composed of John W. Knight, who resided at the time of the adjudication of said partnership to be a bankrupt and still resides in Decatur, Alabama; William D. Nesbitt, who then resided and still resides at Birmingham, Alabama; William J. Yancey, who then resided and now resides in Memphis, Tennessee; and Robert H. Nesbitt, who then resided and now resides in Spartanburg, South Carolina; that the principal place of business of the said Knight, Yancey & Company was at Decatur, Alabama.

2nd. That, on to-wit, April 29, 1910, the original bill of Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of Knight, Yancey & Company, bankrupt, and Joe T. Gibson, an unsecured creditor of said bankrupt estate, against Latham & Company, a partnership, and others, was filed in this honorable court; that, as will appear by reference to the averments of said original bill, the purpose thereof was to procure the setting aside of a preferential transfer of seventy-eight hundred bales of cotton made by the bankrupt, Knight, Yancey & Company, to the respondent, Latham & Company, within four months prior to the adjudication in bankruptcy of said bankrupt, and to prevent the removal of forty-two hundred of such bales of cotton at the port of Mobile, Alabama, from without the jurisdiction of the courts of the United States.

55 3rd. Complainant further shows to the court that, as will appear by the record and proceedings in said cause, this honorable court caused forty-two hundred bales of cotton particularly referred to in the original bill, which said cotton was at the port of Mobile, to be seized and sequestered by the marshal of this district; and, thereafter, upon the appearance and application of said Latham & Company, permitted them to file their bond in this cause, with surety conditioned on the obligors therein having forthcoming and delivering within sixty days from the date of any final decree of this honorable court, the cotton in said bond mentioned to the proper officer of the court; or to pay and satisfy such decree as may be rendered in this cause, which said bond was payable to the order of complainants in said cause, and such other persons as might becomes parties complainant therein, severally; and, upon the execution and approval of said bond, this court permitted the said Latham & Company to take into their possession the forty-two hundred bales of cotton hereinbefore mentioned. Thereafter, said Latham & Company filed their demurrers in said cause, which remain undisposed of.

4th. Said William S. Lovell, as trustee, as aforesaid, further shows to the court that, at the time said original bill of complaint was filed,

no trustee in bankruptcy of said bankrupt estate had been appointed; and that the first meeting of the creditors of said bankrupt estate was held on, to-wit, May 26th, 1910, and that at such meeting he, the said William S. Lovell, was duly appointed the trustee in bankruptcy of the estate of Knight, Yancey & Company, bankrupt, as will more fully appear by reference to the order approving his bond as such trustee, a copy whereof is hereto attached as Exhibit "A," and prayed to be taken as a part of this supplemental bill.

5th. Orator further charges that said Knight, Yancey & Company were, prior to the adjudication of bankruptcy of said Knight, Yancey & Company, engaged in the purchase of cotton at various points in the cotton producing section of the United States, and exporting said cotton to various ports in foreign countries; that said Knight, Yancey & Company having become involved in financial difficulties, had issued a large number of spurious bills of lading pur-
56 porting to be for cotton actually shipped, but which was in fact not shipped, among which bills of lading were bills of lading for, to-wit, seventy-eight hundred bales of cotton to which spurious bills of lading were attached drafts drawn by the said Knight, Yancey & Company on the respondent, Latham & Company, which said drafts were accepted by or for said Latham & Company, and which were for the sum of to-wit, 2,936,430 francs, or $572,603.85, and that said amount approximated the market value of said seventy-eight hundred bales of cotton at the time they were drawn; said drafts were drawn from time to time from January 27th, 1910, to February 16th, 1910.

Complainant further avers that said drafts were paid by or for Latham & Company, and that their purpose in paying said drafts was to obtain the bills of lading thereto attached, and by such means to accomplish the purchase of and to secure the bales of cotton called for by said bills of lading; and complainant avers that, by the payment of said drafts to which were attached said spurious bills of lading, respondent, Latham & Company, became and were creditors of said bankrupt in the sum of to-wit, $572,603.85; and that they were such creditors on to-wit, April 14, 1910.

Complainant further avers that, as a matter of fact, the spurious bills of lading before mentioned were not issued by the carriers, which it was purported had issued them, and the cotton called for by said bills of lading had not been received by the carriers which purported to issue them, and that said papers purporting to be bills of lading were wholly void and of no effect.

Complainant further charges that, on to-wit, April 14, 1910, one Pierre Walther, who was the agent of and who acted for said Latham & Company in the premises, demanded of said Knight, Yancey & Company the delivery to said Latham & Company of genuine and valid bills of lading for, to-wit, seventy-eight hundred bales of cotton in payment and satisfaction of the aforesaid indebtedness of Knight, Yancey & Company to said Latham & Company.

Complainant charges that, on said date, and on all other dates mentioned in this bill, said Knight, Yancey & Company were insol-

vent; and that, at the time of the transfer hereinafter men-
57 tioned, said Latham & Company has reasonable cause to believe that said Knight, Yancey & Company was insolvent; that, on to-wit, April 14, 1910, Knight, Yancey & Company transferred to Latham & Company, which was then a creditor of Knight, Yancey & Company, as aforesaid, a portion of the property of said Knight, Yancey & Company, to-wit, seventy-eight hundred bales of cotton in payment of said indebtedness of said Knight, Yancey & Company to Latham & Company, with the intent to prefer said Latham & Company over the other creditors of said Knight, Yancey & Company; that the effect of such transfer will be to enable said Latham & Company to obtain a greater per cent of the indebtedness due them by said Knight, Yancey & Company than the other unsecured creditors of said Knight, Yancey & Company unless said transfer is set aside by this honorable court; and that, at the time of said transfer, said Latham & Company had reasonable cause to believe that, by said transfer, said bankrupt intended to prefer said Latham & Company over its other creditors; that said transfer was made by said Knight, Yancey & Company to said Latham & Company within four months prior to the time said Knight, Yancey & Company were adjudged bankrupts, as aforesaid.

Orator is advised by counsel, and therefore charges, that said transfer of said seventy-eight hundred bales of cotton to said Latham & Company by said Knight, Yancey & Company was, under the acts of congress relating to bankruptcy, a preferential transfer, which should be avoided, and that said seventy-eight hundred bales of cotton, or the value thereof, in equity and good conscience belong to said bankrupt estate, and should be administered for the benefit of the creditors of said bankrupt; orator further charges that the unsecured debts of said bankrupt, provable in bankruptcy, approximate the sum of to-wit, five million dollars. Orator further charges that said Knight, Yancey & Company was duly adjudged a bankrupt on to-wit, April 20, 1910, as charged in said original bill.

6th. The value of the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum of two thousand dollars.

7th. Your orator, the said William S. Lovell, now submits
58 himself to the jurisdiction of this court, and offers to do equity and to perform all such terms and conditions as may be required by the court upon the granting of relief to him. Orator further assumes all obligations and undertakings of the original complainants in this cause, and claims the benefit of all prior proceedings therein.

*Prayer.*

The premises considered, complainant prays that respondent, Latham & Company, be ordered to answer this his supplemental bill, as well as the original bill in this cause; and that he, the said William S. Lovell, as trustee aforesaid, be substituted and made the sole complainant in this cause; and that this court will order and direct that he, the said William S. Lovell, have the benefit of all prior orders

and proceedings had in this cause, and that the bond heretofore given by respondent, Latham & Company, in this cause, to have forty-two hundred bales of cotton therein referred to forthcoming, shall be held and deemed to be for his benefit.

Complainant further prays that the transfer of the seventy-eight hundred bales of cotton, hereinbefore mentioned, to Latham & Company by said bankrupt be set aside and held for naught; that respondent, Latham & Company, by decree of this court be required to deliver said bales of cotton to complainant, to be by him administered as part of the assets of said bankrupt estate; or, that, in default thereof, complainant have a personal decree against respondent for the value of said seventy-eight hundred bales of cotton, and that execution issue against the sureties on the forthcoming bond filed in this cause by Latham & Company for the value of said forty-two hundred bales of cotton; and for such other further and general relief as in equity and good conscience he may be entitled to.

WILLIAM S. LOVELL,
*As Trustee in Bankruptcy of Knight, Yancey & Company, Complainant.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Complainant.*

59 STATE OF ALABAMA,
*Jefferson County:*

William S. Lovell being duly sworn deposes and says that the averments of fact contained in the foregoing are true.

WILLIAM S. LOVELL.

Subscribed and sworn to before me, this 23rd day of June, 1910.
DAVID B. ADAMS,
*Notary Public.*

EXHIBIT "A."

*Order Approving Trustee's Bond.*

At a Court of Bankruptcy Held in and for the Northeastern Division of the Northern District of Alabama, at Birmingham, Alabama, this May 26, 1910.

In District Court of the United States for the Northeastern Division of the Northern District of Alabama.

In the Matter of KNIGHT, YANCEY & COMPANY, Bankrupt. In Bankruptcy.

It appearing to the court that Wm. S. Lovell, of Birmingham, Ala., and in said district, has been duly appointed trustee of the estate of the above named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the

amount fixed by order of the court, to-wit, in the sum of one hundred thousand dollars, it is ordered that the said bond be, and the same is hereby, approved.

May 26, 1910.

JERE MURPHY,
*Referee in Bankruptcy.*

A true copy.

CHAS. J. ALLISON, *Clerk.*

Filed by leave of the court August 20, 1910.

RICHARD JONES, *Clerk.*

60 *Motion by Frost and Lovell, Receivers, and Lovell, Trustee, to Dismiss Cross-bill of Knauth, Nachod & Kuhne.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,
vs.
LATHAM & COMPANY et als., Respondents.

Come Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and also comes William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, bankrupts, and appear specially for the purpose of making this motion, and for no other purpose, and move the court to dismiss the cross-bill or petition of intervention filed in this cause by Freidrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gübelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne against Edmond Latham and others, including these movants, and as grounds for this motion show:

1. That the said Clarence E. Frost and William S. Lovell are both citizens of and reside in the Northern District of Alabama, and that no valid personal service of a subpœna to answer said cross-bill or petition of intervention has been had or can be had upon them; and that the subject matter of said cross bill or petition of intervention is not within the jurisdiction of this honorable court, and that no valid order of publication can be made in this cause requiring these movants to answer said bill.

2. Because this court is without jurisdiction to hear and determine the matters and things set forth in said cross-bill or petition of intervention in the absence of voluntary appearance thereto by these movants, and that these movants have not voluntarily appeared to plead to said cross bill or petition of intervention.

61 C. E. FROST,
*As Receiver of Knight, Yancey & Company, Bankrupts.*
WILLIAM S. LOVELL,
*As Receiver of Knight, Yancey & Company, Bankrupts.*
WILLIAM S. LOVELL,
*As Trustee of Knight, Yancey & Company, Bankrupts.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,

STATE OF ALABAMA,
*Jefferson County:*

William S. Lovell being duly sworn deposes and says that he is authorized to make this affidavit for the movants in the above cause, and that this motion is not interposed for the purpose of delay, and that the statements of fact therein contained are true.

WILLIAM S. LOVELL.

Subscribed and sworn to before me, this the 3rd day of September, 1910.

PAUL D. THOMAS,
*Notary Public.*

Filed September 5, 1910.

RICHARD JONES, *Clerk.*

*Motion of Lovell, Trustee, to Strike from the File the Answer of Knauth, Nachod & Kuhne to Original Bill.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY et al., Respondents.

62 Comes William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, bankrupts, and the present sole complainant in the above entitled cause and appears specially for the purpose of making this motion and for no other purpose, and moves the court to strike from or take off the files in this cause a certain paper in writing that purports to be the answer of Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne, composing partnership firm of Knauth, Nachod & Kuhne, to the amended bill of complaint in this cause, and as grounds for this motion show, (such grounds being separate and several):

1. That there is nothing in the pleadings in this cause or the practice of this court authorizing or justifying the attempt of said Nachod and others to make said paper an answer in these proceedings.

2. That there is nothing in the pleadings in this cause or the practice of this court that authorizes or justifies the attempt by the said Nachod and others to make themselves parties defendant in this cause.

3. That there is nothing in the pleadings in this cause or the practice of this court that authorizes or justifies the attempt of the said

Nachod and others to make themselves party defendants in this cause as attempted in said so-called answer.

WILLIAM S. LOVELL,
*As Trustee for Knight, Yancey & Company, Bankrupts.*
RICH & HAMILTON,
PERCY, BENNERS & BURR,
*Solicitors for Movant.*
RICH & HAMILTON,
*Solicitors for Movant.*

Filed Sept. 5, 1910.

RICHARD JONES, *Clerk.*

63 *Demurrers of Latham & Company to Cross-bill — Knauth, Nachod & Kuhne.*

Circuit Court of the United States, Fifth Circuit and Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers, et al.
vs.
LATHAM & COMPANY et al.

The joint and several demurrer of Edmond Latham, Charles W. Latham and Raoul Latham, composing the copartnership of Latham & Company, defendants, to the cross-bill of complaint of Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Guebelman, Arend H. Weingardt, Rollin C. Newton, Marias W. Knauth and Percival Kuhne.

These defendants respectively by protestation not confessing or acknowledging any or all of the matters and things in the said plaintiffs' cross-bill to be true in the manner and form, as the same are therein set forth and alleged, do demur thereto and for cause of demurrer show:

First.

That this court is without jurisdiction ratione materiæ to hear or determine the matters and things in the bill and supplemental bill of complaint herein as therein pleaded and set forth and is, therefore, also without jurisdiction to hear and determine the matters and things in said cross bill of complaint as therein pleaded and alleged:

Second.

That the cross complainants have no capacity, power or authority to institute, maintain or prosecute said cross-bill in the form and for the matters and things therein alleged:

Third.

That the cross complainants have not, in and by said cross-bill of complaint made and stated, any such cause of action as does
64 or may entitle them to any such relief as is thereby sought and prayed for against and from these defendants.

Wherefore these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Company, Defendants.*

STATE OF LOUISIANA,
*Parish of Orleans:*

Walker B. Spencer makes solemn oath and says: That he is a member of the law firm of Howe, Fenner, Spencer & Cocke, the solicitors for the defendants, Latham & Company; that none of the members of said firm are present in the United States; that the foregoing demurrer is not interposed for delay.

W. B. SPENCER.

Sworn to and subscribed before me this 13th day of September, 1910.

PIERRE D. OLIVIER,
*Notary Public.*

I certify hereby that in my opinion the foregoing demurrer is well founded in point of law.

W. B. SPENCER,
*Solicitor for Defendants, Latham & Company.*

Filed Sept. 15, 1910.

RICHARD JONES, *Clerk.*

*Demurrers of American Surety Company to Cross-bill of Knauth, Nachod & Kuhne.*

Circuit Court of the United States, Fifth Circuit and Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, Receivers, et al.
vs.
LATHAM & COMPANY et al.

65 The demurrer of the American Surety Company of New York to the cross-bill of Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Guebelman, Arend H. Weingardt, Rollin C. Newton, Marias W. Knauth, and Percival Kuhne.

This defendant by protestation not confessing or acknowledging any or all of the matters and things in said plaintiffs' cross-bill to be true in the manner and form therein set forth and alleged, do demur thereto and for cause of demurrer shows:

First.

That this court is without jurisdiction ratione materiæ to hear and determine the matters and things in the bill of complaint and supplemental bill of complaint herein, as therein pleaded and set forth, and is, therefore, also without jurisdiction to hear and determine the matters and things in said cross-bill of complaint as therein pleaded and alleged:

Second.

That said cross complainants have no capacity, power or authority to institute, maintain or prosecute said cross-bill in the form and for the matters and things therein alleged;

Third.

That the cross complainants have not in and by said cross-bill of complaint made and stated any such cause of action sought and prayed for from and against these defendants.

Wherefore these defendants pray the judgment of this court whether it shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for American Surety Company of New York, Defendant to Cross-bill.*

STATE OF LOUISIANA,
*Parish of Orleans:*

Peter F. Pescud makes solemn oath and says: That he is the manager of the American Surety Company of New York
66 in the State of Louisiana and the proper person to make this affidavit; that the foregoing demurrer is not interposed for delay.

PETER F. PESCUD.

Sworn to and subscribed before me this 14th day of September, 1910.

PIERRE D. OLIVIER,
*Notary Public.*

I certify hereby that in my opinion the foregoing demurrer is well founded in point of law.

W. B. SPENCER,
*Solicitor for American Surety Company of New York.*

Filed Sept. 15, 1910.

RICHARD JONES, *Clerk.*

*Answer of Latham & Company to Original Bill and Supplemental Bill.*

United States Circuit Court for the Fifth Circuit and Southern District of Alabama, Southern Division.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et als., Defendants.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupt, Substituted Plaintiff,

vs.

LATHAM & COMPANY, a Partnership, Defendants.

The joint and several answer of Edmond Latham, Charles W. Latham and Raoul Latham to the original bill of complaint of Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson, and to the supplemental bill of complaint of William S. Lovell, as trus-
67 tee in bankruptcy of Knight, Yancey & Company, bankrupt.

These defendants respectively, now and at all times hereafter saving unto themselves all and all manner of benefit or advantage of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections in said original and said supplemental bills of complaint contained, and expressly reserving

the benefit of the demurrers, pleas and objections heretofore filed and interposed by these defendants and overruled by the court, for answer to so much of said original bill of complaint as these defendants are advised it is necessary to answer unto, and for answer to the supplemental bill of complaint, or so much thereof as these defendants are advised it is necessary or material for them to make answer to, answering say:

1. They admit the allegations contained in the first paragraph of said original and said supplemental bills contained, except the allegation contained in said original bill to the effect that the firm of Latham & Company is a partnership composed of Edmond Latham, Charles W. Latham, Raoul Latham and Pierre Walther; they deny that Pierre Walther is a member of said firm. And except the allegation contained in said paragraph of said original bill to the effect that Joe T. Gibson was, at the time of the filing of said bill, or now is a creditor of Knight, Yancey & Company in the sum of $15,000, or any other sum.

2. Answering the allegations contained in the second paragraphs of said supplemental bill, these defendants admit that on or about April 29th, 1910, Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of Knight, Yancey & Company, bankrupt, and Joe T. Gibson, an alleged unsecured creditor of said bankrupt firm, filed the original bill herein against Latham & Company, a partnership, and others, but as to the purpose of said original bill and the averments therein contained, these defendants beg leave to refer to said original bill for a more accurate and proper statement of the purpose and allegations thereof.

3. Answering the allegations contained in the third paragraph of said supplemental bill, these defendants admit that this
68 honorable court caused 4,200 bales of cotton, the property of these defendants, then in the possession of the Elder, Dempster Steamship Line for purposes of transportation to these defendants in Havre, France, to be seized and sequestered at the instance of said Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupt, and Joe T. Gibson, an alleged unsecured creditor of said bankrupts, and that thereafter, upon the appearance and application of these defendants, said court entered its order and decree permitting these defendants to file their bond in this cause, with good and solvent surety conditioned that these defendants would have forthcoming, within sixty days from the date of any final decree of this honorable court, the cotton in said bond mentioned to the proper officers of this court, or in default, would pay and satisfy such decree as might be rendered against them in this cause; and these defendants, for a more particular and accurate statement of the terms and conditions of said order and decree of sequestration of said bond and of the proceedings had, beg leave to refer to the same and make same a part of this answer. They admit that, upon the execution and approval of said bond, said 4,200 bales of cotton were delivered by the marshal to these defendants.

4. Answering the allegations contained in the fourth paragraph of said supplemental bill of complaint, these defendants admit that

at the time said original bill of complaint was filed herein by said Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupt, and Joe T. Gibson, an alleged unsecured creditor, no trustee in bankruptcy of said bankrupt estate had been appointed, and that the first meeting of the creditors of said bankrupt estate was held on the 26th day of May, 1910, and that at said meeting William S. Lovell was elected the trustee in bankruptcy of the estate of Knight, Yancey & Company, bankrupt.

5. Answering the allegations contained in the second paragraph of said original bill of complaint, and the allegations contained in the fifth paragraph of said supplemental bill of complaint, these defendants say that some of the matters and things in said paragraphs alleged are true, but that most of the allegations in said paragraphs are untrue, and these defendants in the circumstances
69 prefer to deny all the matters and things in said paragraphs contained as therein alleged and pleaded, and to state the real truth of the transactions between said Knight, Yancey & Company and the firm of Latham & Company, and they therefore aver the true facts to be as follows:

The firm of Knight, Yancey & Company for many years prior to 1910 were engaged at Decatur, Alabama, in the business of buying cotton from various persons in the cotton growing states of the United States and of selling the same (either before or after actual purchase thereof by them) to spinners or dealers in various states of the United States, or in foreign countries, either for immediate or future delivery. And, as is customary with persons engaged in said business, they frequently sold cotton for future delivery when, at the date of the agreement to sell, they did not actually own or have in their possession the kind of cotton or the number of bales sold by them, but relied on their ability to acquire same in the open market before the time of delivery specified in their said contracts to sell arrived.

The firm of Latham & Company had its principal place of business in Havre, France, and were engaged in buying cotton for their own account in the United States and elsewhere and of selling the same for immediate or future delivery to spinners and manufacturers in Europe. In the course of said business it was customary to purchase cotton in the United States for future delivery, to enable them to obtain deliveries of cotton purchased by them in the United States at approximately the dates that they owed deliveries to the spinners to whom they had sold. Such sales and purchases were not of any particular or specified cotton, but only of cotton of certain specified grades and qualities.

The firm of Latham & Company had for a number of years prior to the year 1910 and in the usual course of business made purchases of cotton in this manner from Knight, Yancey & Company; and as necessarily the offers to sell or buy cotton and the acceptance thereof must be by exchange of cables between them, as a matter of convenience an understanding was reached between said firms prior to entering into any relations or having any transactions, covering the general terms and conditions of offers and acceptances passing be-

tween them, which were to be considered as embodied or
70 understood in all agreements between them for the sale and purchase of cotton, and these defendants annex hereto as "Exhibit A" a copy of said general terms of agreement between said two firms, and pray that it may be taken as a part hereof; that on or about the 13th day of January, 1910, these defendants made a cable offer to said Knight, Yancey & Company to purchase 4,800 bales of cotton of a certain quality and at a certain price therein named, said cotton to be shipped so as to reach the ocean carrier in the months of February-March, and on the same day, by cable, said Knight, Yancey & Company accepted said offer; and on or about the 3rd day of February, 1910, said Knight, Yancey & Company offered by cable to sell to said Latham & Company 3,000 bales of cotton of a certain quality and at a certain price therein named, said cotton to be shipped so as to reach the ocean carrier in the months of March-April, and on the same day, by cable, said Latham & Company accepted said offer; thereby in each case an agreement to sell and purchase was perfected, and Knight, Yancey & Company became obligated to sell and deliver, and said Latham & Company became obligated to accept and pay for, the number of bales of cotton of the character and at the prices and upon the terms and conditions in said agreements of sale and purchase agreed upon; that by the terms of said general agreement, which as aforesaid was to be incorporated and taken as a part of such transactions, said Knight, Yancey & Company had a right to demand, and said Latham & Company were obligated to make payment for said cotton sixty days after sight of draft drawn by said Knight, Yancey & Company on said Latham & Company for the amount of the agreed purchase price of hundred bale lots of said cotton, said drafts to be accompanied by policies or certificates of insurance duly endorsed to said Latham & Company and by evidence of delivery of said cotton to a carrier, which fact of delivery was to be evidenced by a bill of lading of a carrier endorsed to Latham & Company; that prior to April 1st, 1910, said Knight, Yancey & Company had drawn sixty day drafts on said Latham & Company aggregating the sum of about 2,936,430 francs, or about $572,603.85 in United States currency, representing the purchase price of said 7,800 bales of cotton, to which said drafts Knight, Yancey & Company had attached policies or certificates of insurance
duly endorsed to said Latham & Company, and documents
71 purporting to be bills of lading evidencing the delivery of said cotton to carriers for transportation, endorsed to Latham & Company, and said Latham & Company, believing that said cotton had been so delivered to said carriers and that under the terms of said general agreement the payment for said cotton was due Knight, Yancey & Company, accepted said drafts; that in truth said Knight, Yancey & Company, although having the cotton, had not at the time some of said drafts were accepted delivered the cotton to the carriers, as they had induced said Latham & Company to believe, and in truth the documents or bills of lading attached to said drafts purporting to evidence delivery of said cotton to said carriers were

spurious; thereby said Knight, Yancey & Company fraudulently induced said Latham & Company to pay for said cotton in advance of the time agreed upon, but said Knight, Yancey & Company were thereby in no wise released from their agreement to sell or deliver the same, or was their agreement to sell and deliver in any wise affected save at the option of said Latham & Company; thereafter at various dates prior to the adjudication in bankruptcy of said Knight, Yancey & Company they did deliver to said Latham & Company, through the medium of common carriers, 7,800 bales of cotton which they had agreed to sell to said Latham & Company, and particularly had delivered to Latham & Company, through carriers at the port of Mobile, Alabama, the 4,200 bales of cotton seized and sequestered in this cause, as in law they were bound and had a right to do in fulfillment of the obligations of their said agreements to sell.

These defendants are informed and believe, and therefore aver, that it *is* was not the object or purpose of said Knight, Yancey & Company to actually defraud these defendants by inducing them to purchase and pay for cotton which Knight, Yancey & Company never intended to deliver, but that it was always the intention and purpose of said Knight, Yancey & Company to deliver said cotton to these defendants. The object and purpose of said Knight, Yancey & Company in so inducing these defendants to pay for said cotton in advance of the time agreed upon was to enable them to obtain ready money at a rate of interest much lower than they could obtain it in this country, as it had been the custom for many years in said business that, where shipments of cotton were delayed
72 beyond the contractural period, the purchaser had a right to claim, and the seller was obliged to pay interest on the purchase price at the rate of not exceeding five per cent per annum, whereas Knight, Yancey & Company could not obtain money in Decatur, Alabama, or elsewhere in the United States at rates less than eight or ten per cent per annum, and while said Knight, Yancey & Company had not at the times when said drafts were accepted by Latham & Company delivered all of the cotton which they had agreed to sell and deliver to these defendants, yet at said times they had acquired all, or nearly all, of said cotton for that purpose, and had delivered a large part and were engaged in delivering the rest of said cotton to carriers in accordance with their said agreements to sell, and in fact prior to the adjudication in bankruptcy had delivered all of said cotton to carriers for the purposes aforesaid, and had received bills of lading therefor from said carriers; that it was the custom of said Knight, Yancey & Company, and at all times their purpose and intention, when they did deliver such cotton to said carriers and received bills of lading therefor, to make said deliveries in marks and weights and places of origin correspond as closely as might be with the description of the cotton mentioned in said spurious bills of lading, and to hold, and they did hold, in their possession said genuine bills of lading until such time as such cotton might reach its destination, where it would be delivered to the purchasers by the carriers on said spurious bills of lading, and thereafter to destroy said genuine bills of lading.

Further answering the allegations of said paragraphs of said original and supplemental bills of complaint, these defendants admit that it is true that Pierre Walther, their representative, did, on or about April 14th, 1910, demand and receive from said Knight, Yancey & Company the genuine bills of lading covering said cotton, but aver that in law and good conscience said Knight, Yancey & Company held said bills of lading only as the trustees of these defendants, to whom said cotton belonged, and that said Knight, Yancey & Company had no right in law to hold the same adversely to these defendants, and that these defendants had the right in law to demand the delivery thereof from said Knight, Yancey & Company at any time, but they expressly deny that said bills of lading were demanded or received in payment of any sum of money due these defend-
73 ants by Knight, Yancey & Company, or that the delivery thereof in law constituted a transfer of property in payment of a pre-existing debt. They expressly deny that they knew, or had any reasonable cause to know before said delivery or at the time thereof, or until the adjudication in bankruptcy, that Knight, Yancey & Company were insolvent, if it in fact at any such time they were insolvent, which is denied, but on the *contract* they aver that they believed that said Knight, Yancey & Company were abundantly solvent; and they expressly deny that Knight, Yancey & Company intended to prefer these defendants over other creditors, or that these defendants had any reasonable grounds to believe that said Knight, Yancey & Company intended to prefer them, and deny that any act done by Knight, Yancey & Company or by these defendants or their representative in reference to said cotton was in law a preference.

Except as herein admitted these defendants deny each and every allegation in said paragraphs of said bills of complaint contained.

6. Except as herein above admitted or denied or answered, these defendants deny all and singular the allegations in said original and said supplemental bills of complaint contained.

Wherefore, having fully answered unto the said bills of complaint in so far as these defendants are advised it is necessary for them to answer, they pray that the complainants' demands may be rejected and that they be hence dismissed with their costs in the premises unjustly sustained.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Defendants.*

Filed November 8, 1910.

RICHARD JONES, *Clerk.*

74 *Decree Allowing Knauth, Nachod & Kuhne to File Amended Cross-bill.*

Circuit Court of the United States for the Southern District of Alabama.

Cross-bill. In Equity. 279.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM and Others, Defendants.

In this cause it is ordered, adjudged and decreed, as follows, viz:

1. That the complainants above named be and hereby are granted leave to file their amended cross-bill, verified on or about the 16th day of December, 1910, in this suit; and that the same be filed accordingly and take the place of the original cross-bill of said complainants, verified on or about the 27th day of June, 1910, subject to any objections that may be raised by adverse parties.

2. That the above entitled cross-suit be and hereby is discontinued, as to the Louisville & Nashville Railroad Company, a party defendant to the original cross-bill but not a party to the amended cross-bill.

3. That the issue and service of the subpœna ad respondendum and of the alias subpœna ad respondendum and of any other order or process upon or subsequent to the filing of the complainants' cross-bill be and hereby is deemed to have been issued and served upon said amended cross-bill.

4. That the defendants Edmond Latham, Charles Latham, Raoul Latham, American Surety Company of New York, John W. Knight, William J. Yancey, William D. Nesbitt, Robert H. Nesbitt, Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of Knight, Yancey & Company, and William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, be and each of them hereby is directed and required to appear, plead, answer or demur to the said amended cross-bill on or before the next rule day occurring twenty days after the filing thereof.

75 5. It is further ordered that a copy of said amended cross-bill be given the solicitors for Latham & Co., and William S. Lovell, trustee in bankruptcy of Knight, Yancey & Co.

Made this December 20, 1910.

HARRY T. TOULMIN, *Judge.*

Filed and entered December 20, 1910.

RICHARD JONES, *Clerk.*

*Amended Cross-bill of Knauth, Nachod & Kuhne and Exhibits Thereto.*

In the Circuit Court of the United States, Southern District of Alabama, Southern Division.

Equity. No. 279.

FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth, and Percival Kuhne, Complainants,
against
EDMOND LATHAM, CHARLES LATHAM, RAOUL LATHAM, AMERICAN Surety Company of New York, John W. Knight, William J. Yancey, William D. Nesbitt, Robert H. Nesbitt, Clarence E. Frost, and William S. Lovell, as Receivers in Bankruptcy of the Estate of Knight, Yancey & Company, Bankrupts; William S. Lovell, as Trustee in Bankruptcy of the Estate of Knight, Yancey & Company, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of Alabama, Southern Division:

Friedrich Nachod, of Leipzig, Germany, and a citizen or subject of Germany; Max Jaffe, of Leipzig, Germany, and a citizen or subject of Germany; Wilhelm Knauth, of Arrochar, county of
76 Richmond, city and State of New York, and a citizen or subject of Germany; August Stern, of Leipzig, Germany, and a citizen or subject of Germany; Oscar L. Gubelman, of West Orange, Essex county, New Jersey, and a citizen of the State of New Jersey; Arend H. Weingardt, of Montclair, Essex county, New York, and a citizen or subject of Germany; Rollin C. Newton, of Scarsdale, Westchester county, New York, and a citizen of the State of New York; Mary W. Knauth, of the county, city and State of New York, and a citizen of the State of New York; and Percival Kuhne, of the county, city and State of New York, and a citizen of the State of New York, bring this their amended cross-bill of complaint (or their petition or bill of complaint in intervention, if the court hold that it should be so denominated) against Edmond Latham, of Havre, France, and a citizen of the French republic; Charles Latham, of Havre, France, and a citizen of the French republic; Raoul Latham, of Havre, France, and a citizen of the French republic; American Surety Company of New York, N. Y., a corporation organized under the laws of the State of New York, but also doing business in Mobile, Alabama; Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of Knight, Yancey & Company, bankrupts, having been appointed by the United States District Court, in Bankrutpcy, for the Northern District of Alabama, Northeastern Division; John W. Knight, of Decatur, Alabama, and a citizen of the State of Alabama; William J. Yancey, of Memphis, Tennessee, and a citizen of the State of Tennessee; William D. Nesbitt, of Birmingham, Alabama,

and a citizen of the State of Alabama; Robert H. Nesbitt, of Spartanburg, South Carolina, and a citizen of the State of South Carolina; and William S. Lovell, as trustee in bankruptcy of the estate of Knight, Yancey & Company, having been appointed by the United States District Court, in bankruptcy, for the Northern District of Alabama, Northeastern Division. And thereupon your orators make this their amended cross-bill of complaint, and upon information and belief, say:

1. The following papers are on file and the proceedings evinced thereby have been had in the suit in this court originally entitled,

Clarence E. Frost and W. S. Lovell, as Receivers of Knight,
77 Yancey & Company, Bankrupts, and Joe T. Gibson, complainants, vs. Latham & Company, a Partnership, et al., Respondents. In Equity, No. 279, to-wit:

(*a*) Bill of complaint verified on or about April 29, 1910, with the exhibits thereto annexed.

(*b*) Decree for sequestration, dated on or about May 3, 1910.

(*c*) Receipt of the clerk for $6,714.82, dated on or about May 9, 1910.

(*d*) Bond of the Receivers, Joe T. Gibson and National Surety Company, dated on or about May 3, 1910.

(*e*) Writ of sequestration and marshal's return thereto, the writ bearing teste on or about May 4, 1910.

(*f*) Petition or application to amend said bill making all persons claiming an interest in the cotton in question parties defendant, verified on or about May 5, 1910.

(*g*) Order amending bill as asked for in said petition, granted on or about May 5, 1910.

(*h*) Notice of motion, returnable on or about May 6, 1910, to modify the decree granted on or about May 3, 1910.

(*i*) Decree of modification, granted on or about May 6, 1910.

(*j*) Petition of Latham & Company, verified on or about May 14, 1910, for the release of 4,300 bales of the sequestrated cotton. (4,200 B. C. formally sequestrated.)

(*k*) Decree for release upon furnishing a bond, granted on or about May 14, 1910.

(*l*) Bond of Latham & Company and the American Surety Company given for the release of the sequestrated cotton, being in the amount of $325,000 and dated on or about May 14, 1910.

(*m*) Demurrer by Latham & Company to the bill of complaint, verified on or about May 24, 1910.

78 The suit above mentioned is the suit in which this amended cross-bill is filed. The papers above mentioned are referred to and, by such reference, the contents thereof and the proceedings evinced thereby are herein recited. Such recital is made by reference for the sake of brevity and the consequent abridgment of the work, both of the court and of all parties concerned.

2. Your orators, Knauth, Nachod & Kuhne (being thus called upon to do so by the said amendment to said bill in this suit, making all persons claiming an interest in the 7,800 bales of cotton in question parties defendant) duly appeared in the said suit and filed

their answer to said bill of complaint and also their cross-bill in lieu of which this amended cross-bill is filed. Since said cross-bill was filed the following papers have been filed and the proceedings evinced thereby had, to-wit:

(*n*) Decree overruling said demurrer of Latham & Company and certain objections made by them, to the filing of a supplemental bill by William S. Lovell, as trustee; substituting William S. Lovell as trustee for the original complainants and making him the sole complainant; dismissing the cause as to the Louisville & Nashville Railroad Company and others not parties to said cross-bill of Knauth, Nachod & Kuhne and as to John W. Knight, William D. Nesbitt, Robert H. Nesbitt, and William J. Yancey; and also amending the original bill of complaint in a number of particulars.

(*o*) Supplemental bill of William S. Lovell, trustee, verified on or about June 23, 1910, together with the exhibits thereto attached.

The papers above mentioned are also referred to and, by such reference, the contents thereof and the proceedings evinced thereby are herein recit-d. Such recital is also made by reference for the sake of brevity and the consequent abridgment of the work, both of the court and of all parties concerned.

79 3. The above named American Surety Company was not an original party to said original suit but voluntarily made itself a party by the execution of the bond above mentioned, and subjected itself in that way to the jurisdiction of the court, and is, therefore, made a party to this amended cross-bill. The said bond is in the sum of $325,000.00 and is to the effect that said Latham & Company will have forthcoming and deliver to the proper officer of this court, within sixty days from the date of and final decree of this court, said cotton; or will pay and satisfy such decree as may be rendered. The above named William S. Lovell, as trustee, was not originally a party to said original suit but was appointed trustee in *k*ankruptcy of the estate of Knight, Yancey & Company, on or about the 26th day of May, 1910, and gave the prescribed bond and entered upon the performance of his duties as such trustee and thereupon succeeded to all the right, title and interest of the said receivers and has been substituted as sole complainant therein. He is, therefore, made a party to this amended cross-bill. The receivers, the original complainants, have been succeeded by the trustee but they have been retained in office for the purpose of continuing any litigation inaugurated by them and being parties defendant to the original cross-bill and subject to the jurisdiction of the court, are retained in this amended cross-bill for the purpose of sustaining proceedings, if any, which the trustee may be held disqualified to sustain.

4. The Louisville & Nashville Railroad Company was made a party defendant to said original bill. It was made a party defendant to the original cross-bill of your orators, Knauth, Nachod & Kuhne, for that reason and because your said orators wanted it to account for certain cotton that it had received from or for delivery to the bankrupts, Knight, Yancey & Company, which cotton was subject to a charge in favor of Knauth, Nachod & Kuhne. Since the original cross-bill was filed your orators, Knauth, Nachod & Kuhne, have had

access to a copy of a statement purporting to account for all cotton, received by said railroad company from or for delivery to the bankrupts, Knight, Yancey & Company, in which your orators, Knauth, Nachod & Kuhne can have any interest. There is no longer any need, therefore, that said railroad company render an account
80 of said cotton and, the original suit having been discontinued as to it, the cross-suit may also be discontinued as to it. Said railroad company is, therefore, not made a party to this amended cross-bill.

5. The money paid by said receivers, as prescribed in the above decree for sequestration, was the proceeds of certain cotton that had come into their hands as a part of the estate of Knight, Yancey & Company and had been sold by them. The cotton so sold by them, or some parts thereof, had been paid for by the bankrupts with the proceeds of money belonging to your orators, the present complainants, the firm of Knauth, Nachod & Kuhne, and was subject to a charge in their favor and to that extent equitably belonged to said firm, as hereafter more fully set forth.

6. The seventy-eight hundred and eighty-two (7,882) bales of cotton or property, mentioned in the bill of complaint in the original suit, or some parts thereof, had been paid for by the bankrupt firm of Knight, Yancey & Company with the proceeds of money belonging to your orators, the present complainants, the firm of Knauth, Nachod & Kuhne, and was subject to a charge in their favor and to that extent equitably belonged to said firm, as hereafter more fully set forth.

7. During the period from the 5th to the 18th day of April, 1910, your orators, the present complainants, Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth, and Percival Kuhne, were and prior thereto had been and still are co-partners in business, doing business at New York, N. Y., and at Leipzig, Germany, under the firm name and style of Knauth, Nachod & Kuhne and bring this, their amended cross-bill of complaint, (or their petition or complaint in intervention, if the court hold that it should be so denominated), on behalf of their said firm.

8. During the said period from the 5th to the 18th day of April, 1910, and prior thereto and thereafter until their adjudication of bankruptcy the above named defendants, John W. Knight, William J. Yancey, William D. Nesbitt and Robert H. Nesbitt were
81 co-partners in business, doing business at Decatur, Alabama, under the firm name and style of Knight, Yancey & Company as dealers in cotton. They also maintained branch offices at various other places, particularly at Selma, Ala., and Mobile, Ala. During the said period and until their adjudication of bankruptcy and the present time, said Knight, Yancey & Company were hopelessly insolvent and knew that they were insolvent and unable to pay their debts. All the acts of said Knight, Yancey & Company hereafter set forth, were committed by them while insolvent and while they knew that they were insolvent and unable to pay their honest debts.

9. During said period from the 5th to the 18th day of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York, N. Y., some thirteen drafts or bills of exchange to which were attached, among other things thirteen export bills of lading purporting to show that thirteen hundred (1,300) bales of cotton had been delivered by said Knight, Yancey & Company to common carriers for transportation to Liverpool, England, and to Bremen, Germany, and to Reval, Russia, or to other European ports, and for delivery, at the various ports of destination, to the order of said Knight, Yancey & Company, some of said bills of lading purporting to have been issued by the Southern Railway Company and some purporting to have been issued by the Louisville & Nashville Railroad Company. Said drafts were drawn to the order of Knight, Yancey & Company and the cotton mentioned in said bills of lading was to be delivered to the order of said Knight, Yancey & Company and the insurance certificates thereto attached were payable, in case of loss, to said Knight, Yancey & Company and all were endorsed by said Knight, Yancey & Company. Said drafts, bills of lading and other papers were forwarded to one F. van Gerpen, as the agent or broker of said Knight, Yancey & Company or to other agents for the purpose of having the same sold and delivered to your orators, Knauth, Nachod & Kuhne, or other purchasers, as genuine and valid documents and with the intent that the said Knauth, Nachod & Kuhne, or other purchasers, should be misled and deceived into the belief that the said bills of lading were genuine and represented actual shipments of the thirteen hundred (1,300) bales of cotton therein mentioned and should purchase the same on the
82 strength thereof. Said Knauth, Nachod & Kuhne were in fact misled and deceived and did believe that said bills of lading were genuine and represented actual shipments of the thirteen hundred (1,300) bales of cotton therein mentioned; and, on the faith thereof, took and received the said drafts, with said bills of lading attached, and delivered to the said F. van Gerpen or other agents of Knight, Yancey & Company the sum of $98,005.58, except that $154.20 thereof were protest fees and cable charges subsequently paid. Said money was received by said F. van Gerpen or others as the agent or agents and broker or brokers and for the account of said Knight, Yancey & Company and (possibly with broker's commissions deducted) was during the period between the said dates or at about that time, delivered to the said Knight, Yancey & Company as the proceeds of said drafts and bills of lading, except what may have been subsequently paid to the said receivers and to said trustee.

10. Some of said drafts matured ninety days after sight and the rest sixty days after sight. The following is a statement of the date of each of the said drafts; the date of each of the said bills of lading thereto attached; the number of bales and marks of the cotton; and the amount of each of the said drafts, your orators being ready to file a copy of said drafts and of the bills of lading thereto annexed and to produce the originals thereof as the court may direct, to-wit:

| Date of draft, 1910. | Date of B. L., 1910. | Number of bales cotton and marks. | | | Amount of drafts. |
|---|---|---|---|---|---|
| April 9 | April 9 | 100 | PALM | Reichsmarks .. | 31,604 |
| April 9 | April 9 | 100 | QEKP | Reichsmarks .. | 31,394 |
| April 9 | April 9 | 100 | RBUZ | Reichsmarks .. | 31,650 |
| April 11 | April 9 | 100 | QNNN | Francs ..... | 38,924 |
| April 8 | April 8 | 100 | PAIY | Sterling ..... | 1,571-5-8 |
| April 8 | April 8 | 100 | PUUN | Sterling ..... | 1,579-17-11 |
| April 8 | April 8 | 100 | QAAR | Sterling ..... | 1,560-18-6 |
| April 8 | April 8 | 100 | QUHH | Sterling ..... | 1,574-13-1 |
| April 8 | April 8 | 100 | RFFF | Sterling ..... | 1,574-3-1 |
| April 8 | April 8 | 100 | RUKR | Sterling ..... | 1,578-3-0 |
| April 8 | April 7 | 100 | QRRT | Sterling ..... | 1,548-15-9 |
| April 8 | April 7 | 100 | QAJJ | Sterling ..... | 1,534-16-7 |
| April 8 | April 7 | 100 | QFNK | Sterling ..... | 1,441-8-0 |

83 11. The bills of lading annexed to said drafts were not signed or issued by the railroad companies mentioned therein. The cotton mentioned in said drafts and bills of lading was never delivered to the railroad companies. On the contrary, said bills of lading were signed by diverse persons, either the defendant John W. Knight or other persons unknown at this time to your orators, Knauth, Nachod & Kuhne. No cotton was delivered on said bills of lading by the carriers to your orators or to any one else as the indorsee of said Knight, Yancey & Company. Knight, Yancey & Company had not provided for the acceptance of said drafts and had not provided the drawees of said drafts with funds with which to pay the same. Said drafts were duly presented for acceptance, before the said Knauth, Nachod & Kuhne had any knowledge of the said fraud, and acceptance thereof refused. Said drafts were duly protested for non-acceptance and due notice thereof given to the said Knight, Yancey & Company and to all other parties thereto, at an expense to said Knauth, Nachod & Kuhne, in protest fees and cable charges of $154.20. Neither said drafts nor said protest fees and cable charges nor any part thereof have ever been paid to your orators, Knauth, Nachod & Kuhne; said bills of lading were drawn, executed and delivered by said John W. Knight, or other persons acting under his direction for the firm of Knight, Yancey & Company, and were delivered by the firm of Knight, Yancey & Company to the First National Bank of Decatur, Alabama, for the purpose of forwarding the same to New York for sale to your orators, Knauth, Nachod & Kuhne, or others as aforesaid. Knight, Yancey & Company, and all other persons acting with them in the execution, issue and delivery of said instruments, knew at the time that no cotton had been delivered to the railroad companies and knew that said Knauth, Nachod & Kuhne, or other purchasers, would rely on the same as being genuine and representing actual shipments of cotton and knew that the said Knight, Yancey & Company were insolvent and had no means of repaying the money obtained on said instruments and committed all of said acts for the purpose of obtaining, on the strength of said false documents and said false and fraudulent

representations, from your orators, Knauth, Nachod & Kuhne, or others, the said sum of $98,005.58. No cotton has ever been
84 received by your orators, Knauth, Nachod & Kuhne or by any one else on account of the said bills of lading. Since the discovery of the said fraud your orators, Knauth, Nachod & Kuhne, have in no wise affirmed or ratified the transaction or transactions resulting in the delivery of their said money to the said Knight, Yancey & Company, but, on the contrary, have sought to obtain and have demanded and hereby again demand the return to themselves, as the owners entitled thereto, of their said money (the amount being the sum of $98,005.58) and demand that the bankrupts, Knight, Yancey & Company and their successors, including the trustee in bankruptcy, account for the said money and for the cotton or other property paid for therewith or with the proceeds thereof and reimburse your orators, Knauth, Nachod & Kuhne, therefor with interest at 8 per cent. per annum, the legal rate in Alabama. Your orators, Knauth, Nachod & Kuhne are ready and hereby offer to surrender the said drafts, bills of lading and other documents upon being reimbursed for the said $98,005.58, with interest; or upon such other terms as the court shall decree.

12. On the delivery by said Knight, Yancey & Company of the said drafts and bills of lading thereto annexed, to the First National Bank of Decatur, Alabama, a draft or drafts was drawn by said Knight, Yancey & Company upon said F. van Gerpen, their agent or broker, or upon other drawees, for the approximate amount thereof, in money of the United States, and deposited with said bank or other depositaries and by it or them placed to the credit of said firm, the said bank or other depositaries holding collateral security ample to insure the redemption of said drafts in case of dishonor by non-acceptance or non-payment. The said draft or drafts on F. van Gerpen or others were all deposited with the First National Bank of Decatur or other depositaries together with the said foreign drafts and bills of lading during the period from the 5th to the 18th day of April, 1910, or at about that time. During the said period or at about that time and after your orators, Knauth, Nachod & Kuhne, had received said foreign drafts and the bills of lading annexed thereto and had delivered their money to said F. van Gerpen or other agents of Knight, Yancey & Company, said approximate draft or drafts in money of the United States was or were accepted
85 and paid by him or them out of said money of your orators, Knauth, Nachod & Kuhne, and said foreign drafts were all accounted for and the proceeds thereof remitted to Knight, Yancey & Company and deposited by them, with other money, in the First National Bank of Decatur or other depositary, except as some part thereof may have remained in the hands of said F. van Gerpen or other agent and been paid over to the receivers or trustee of Knight, Yancey & Company, as set forth in Schedule 17, hereto annexed. Your orators', Knauth, Nachod & Kuhne's, said $98,005.85 thus became a part of a bank credit or account receivable by Knight, Yancey & Company, which credit or account receivable was held for the benefit of your orators, Knauth, Nachod & Kuhne.

13. On or about the 20th day of April, 1910, said firm of Knight, Yancey & Company was duly adjudicated a bankrupt and on or about the 21st day of April, 1910, the said Clarence E. Frost and William S. Lovell were appointed receivers in bankruptcy of the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of their duties as such receivers. On or about the 26th day of May, 1910, William S. Lovell was duly appointed trustee in bankruptcy for the said firm and qualified, by giving the prescribed bond, and entered upon the performance of his duties as such trustee. Neither the said Knight, Yancey & Company nor its receivers nor its trustee, nor any one else, have returned to the said Knauth, Nachod & Kuhne said $98,005.58, or any part thereof.

14. The bankrupts, Knight, Yancey & Company, having deposited the money of your orators, Knauth, Nachod & Kuhne, with other money of their own, in the First National Bank of Decatur or other depositary, held the entire bank credit or account receivable thus created for the account and in trust for the benefit of Knauth, Nachod & Kuhne, at least to the amount of the money of Knauth, Nachod & Kuhne thus deposited. At the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, the said bank credit or trust fund was expended (except so far as the same may have remained on hand at the date of bankruptcy as set forth in Schedule 17 hereto annexed) for certain cotton and in the creation of
86 certain credits with certain brokers, called deposits for the purchase of cotton. Some of said broker's credits were redeemed, in whole or in part, and the money again deposited with the First National Bank of Decatur or other depositary and thus reunited with the said bank credits or accounts receivable constituting said trust fund. Some of the bank credits or accounts receivable arising from the return of the so-called deposits with brokers, were also expended for certain cotton at the instance of Knight, Yancey & Company, by checks or acceptances or otherwise. Certain of the bank credits, broker's credits and other credits, representing the said trust fund and the money of your orators, Knauth, Nachod & Kuhne, were outstanding at the time of the adjudication of bankruptcy (April 20, 1910), and have been collected by the receivers and by the trustee. Certain of the cotton paid for out of the said trust fund or the proceeds thereof has or have come into the hands of the receivers and of the trustee. The estate in bankruptcy has thus been enriched by the money of your orators, Knauth, Nachod & Kuhne; and the receivers and the trustee hold all such cotton or the proceeds thereof and all such credits or the proceeds thereof in trust for the benefit of Knauth, Nachod & Kuhne, at least to the extent of $98,005.58 and interest thereon from the said 18th day of April, 1910.

15. Your orators, Knauth, Nachod & Kuhne are not able at this time to specify all the cotton paid for out of their money and the money or bank and broker's credits subject to a charge or trust in their favor as above set forth; but annexed hereto, marked Schedule 1, is a list of certain cotton that, among other cotton, was paid for out of the money of Knauth, Nachod & Kuhne or the bank and other

credits constituting the fund or funds held by Knight, Yancey & Company for their account and in trust for their benefit. Annexed hereto and marked Schedules 2 and 3, are lists of certain payments that were made, among others, (out of the money of Knauth, Nachod & Kuhne or the bank and other credits held by Knight, Yancey & Company for their account and in trust for their benefit), for cotton which was stored in the Gulf Compress at Decatur, or elsewhere.

87 Annexed hereto, marked Schedule 4, is a list of cotton that was withdrawn from the Gulf Compress at Decatur or from other places of storage, which cotton is also among the cotton paid for by Knight, Yancey & Company, as set forth in Schedules 2 and 3 or otherwise, out of the money of Knauth, Nachod & Kuhne or out of the bank and other credits held for their account and in trust for their benefit. The cotton mentioned or referred to in Schedules 1, 2, 3 and 4 and each and every part thereof (even though paid for out of bank and other credits constituting a trust fund into which Knight, Yancey & Company had put money on credits of their own as well as the money and credits of Knauth, Nachod & Kuhne equitably belonged to Knauth, Nachod & Kuhne, at least to the amount of said $98,005.58; and the proceeds of said cotton or any part thereof in the hands of the receivers or trustee equitably belongs to Knauth, Nachod & Kuhne, at least to the extent of $98,005.58 and interest thereon.

16. Your orators, Knauth, Nachod & Kuhne are not able as yet to specify all the forms in which the cotton mentioned or referred to in Schedules 1, 2, 3 and 4 or the proceeds thereof have come into the hands of the receivers or trustee or have otherwise inured to the enrichment of the estate of said bankrupts in their or his hands; but annexed hereto are Schedules 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 which exhibit some of the forms in which part of the said cotton or the proceeds thereof have been received by the receivers and trustee of said bankrupts or in which the bankrupt estate has been otherwise enriched out of the money of Knauth, Nachod & Kuhne and the bank and other credits constituting the fund held by the bankrupts for their benefit. The assets mentioned or referred to in said Schedules 5 to 14 inclusive equitably belong to Knauth, Nachod & Kuhne, at least to the extent that said assets or any of them represent any part of the cotton (whether mentioned or referred to in Schedules 1, 2, 3 and 4, or not), paid for out of their money and the bank or other credits constituting the said trust fund held for their benefit. Parts of the cotton mentioned in all said Schedules 5 to 14 inclusive were paid for out of the money of Knauth, Nachod & Kuhne and out of the bank and other credits constituting the said trust fund held by the said bankrupts for their benefit. As to the cotton men-

88 tioned or referred to in Schedules 5, 6 and 7, this court first acquired jurisdiction both of the res and of the parties and should determine all matters in controversy and decree complete justice. These facts should be called to the attention of the United States District Court for the Northern District of Florida, to the end that said court, if it concur, may refuse to hear the cause there pending until this suit be finally determined. By this suit is

meant all issues, whether presented by the original and supplemental bills or by this or any other cross-bill. Your orators Knauth, Nachod & Kuhne are willing that Westphalen & Company appear in this suit and that all matters relating to the cotton mentioned or referred to in Schedule 8, be here determined. Your orators, Knauth, Nachod & Kuhne are ready to assist in the prosecution of the action at law upon the bond given by the master of the steamship Inglefingen, pursuant to an order of the United States District Court for the Eastern District of Louisiana, and mentioned or referred to in Schedule 11. They are also ready to bear their proportionate share, if any, in the expense of that action. If a suit in equity can be substituted in lieu of said action at law, they are ready to appear and assert rights in the cotton in question which are prior and paramount to the rights of the claimants as well as the trustee. They are also willing that the other parties in interest in said action appear in this suit and that all matters involved therein be here determined.

17. Your orators, Knauth, Nachod & Kuhne, are not as yet able to specify all the deposits that were made with brokers and others by the bankrupts, Knight, Yancey & Company, out of the money of Knauth, Nachod & Kuhne and the bank and other credits constituting the trust fund held for their benefit by said bankrupts; but annexed hereto is Schedule 15, which exhibits some of the deposits thus made. Knauth, Nachod & Kuhne are not able as yet to specify all the so-called deposits with brokers and others, which were returned to the said bankrupts and reunited with the bank credits constituting the principal part of said trust fund held by them for the benefit of Knauth, Nachod & Kuhne; but annexed hereto is Schedule 16 which exhibits some of the deposits or credits thus returned. Annexed hereto and marked Schedules 17, 18, 19, 20 and 21 are a list of money, bank credits, broker's credits and other credits collected by the receivers; a list of cotton sold by the receivers; a list
89 of pledged cotton the equity in which was received by the receivers; a list of money, bank credits, broker's credits and other credits collected by the trustee; and a list of receipts by the trustee for or on account of other cotton. The assets thus received by the trustee represent, in whole or in part, certain credits created or certain cotton paid for out of the said money of Knauth, Nachod & Kuhne and the said trust fund held for their benefit. Out of the proceeds of the cotton specified in Schedule 16 the receivers paid the $6,714.82 imposed as a condition of the sequestration of the cotton mentioned in Schedule 5. Part of the cotton thus sold by the receivers and the proceeds of which were thus paid as a condition of sequestration, had been paid for by Knight, Yancey & Company out of the money of Knauth, Nachod & Kuhne.

18. On or about the 14th day of April, 1910, the above named defendants Latham, under their co-partnership name of Latham & Company, obtained from the said Knight, Yancey & Company, bills of lading and shipments of the 7,882 or more bales of cotton mentioned and described in the said bill of complaint and in Schedules 5, 6 and 7 hereto annexed. At the time this suit was instituted said

Latham & Company were engaged in transporting or about to transport the same from Mobile and Pensacola to Havre, France, or other European ports. Said bills of lading and the cotton or property represented thereby were obtained by said Latham & Company on account of an antecedent indebtedness, owing to them by said Knight, Yancey & Company, and without any new or other consideration therefor. At the time said Latham & Company received said bills of lading and the cotton and property represented thereby, the said Knight, Yancey & Company were insolvent and knew that they were insolvent and intended, by the delivery of said bills of lading and the property represented thereby, to give to said Latham & Company a preference over other creditors of the same class, contrary to the provisions and form of the bankruptcy act or acts of the United States in such cases made and provided. At the time said Latham & Company received said bills of lading and the cotton or property represented thereby and undertook to transport the same to Havre, France, or other European ports, they knew or at least had reasonable and probable cause to believe and did in fact believe that
90 the said Knight, Yancey & Company were insolvent and were delivering to them the said bills of lading and cotton or property represented thereby with the intent of giving to them, the said Latham & Company, a preference over other creditors of the same class. The said delivery of said bills of lading and of the cotton or property represented thereby, amounted to and was a transfer (so far as the said Knight, Yancey & Company had the power to make a transfer) within the provisions of the bankruptcy act or acts of the United States and was made within four months immediately preceding the adjudication of bankruptcy of said Knight, Yancey & Company. No further credit was thereafter given by said Latham & Company to said Knight, Yancey & Company, in good faith or otherwise, either with or without security, after the said attempted transfer. Said attempted transfer was void as against the trustee and creditors of Knight, Yancey & Company; but your orators, Knauth, Nachod & Kuhne, have rights and equities that are prior and paramount to the rights of either the said trustee or Latham & Company; and, as against your orators, Knauth, Nachod & Kuhne, said attempted transfer was void and of no effect, regardless of whether it was void or voidable as against said trustee.

19. At the time the bankrupts, Knight, Yancey & Company, made the attempted transfer of the bills of lading and of the 7,800 or more bales of cotton represented thereby to Latham & Company, as aforesaid, said cotton being mentioned in Schedules 5, 6 and 7 hereto annexed and continuously until their adjudication of bankruptcy (April 20, 1910), and the present time, the said bankrupts were and have been insolvent and made the said transfer or attempted transfer for the purpose of hindering, delaying and defrauding their creditors and to conceal said cotton or property from their trustee and from the rightful owners thereof, including Knauth, Nachod & Kuhne.

20. The receivers and the trustee in bankruptcy of Knight, Yancey & Company, so far as your orators, Knauth, Nachod & Kuhne,

are concerned, stand in the place of and have no other or greater rights in the bankrupt estate than their bankrupts, Knight,
91 Yancey & Company, and are charged with the same duties and responsibilities in respect thereto, including the duty to account for the $98,005.58, the money of Knauth, Nachod & Kuhne, and for the bank and other credits constituting the trust fund representing said money which was held for their benefit as aforesaid. Your orators, Knauth, Nachod & Kuhne, requested of the said trustee certain information which was necessary and convenient to enable them to trace their money and the bank and other credits, constituting the trust fund held for their benefit, through a number of ramifications, into the various items of account and property received by said trustee. A statement of the requested information was promised by said trustee but was never furnished. Finally the said trustee, after the demand for a statement of the requested information had been renewed, made application to the United States District Court for the Northern District of Alabama for instructions as to the furnishing of the requested information. Your orators, Knauth, Nachod & Kuhne, appeared and answered the trustee's petition and asked that the trustee be ordered to furnish a statement of the requested information. Knauth, Nachod & Kuhne had offered to pay the expense, if any, of having a statement of the requested information prepared. The objection finally made on behalf of the trustee to furnishing the requested information, was that Knauth, Nachod & Kuhne claimed an interest in the bankrupt estate that was prior and paramount to the claims of general or unsecured creditors and was therefore not a party in interest but an adverse claimant. An objection which your orators submit was utterly untenable and inconsistent with the office of a trustee. During the argument of said application an arrangement was agreed upon by which the trustee, although not furnishing the requested information would give Knauth, Nachod & Kuhne's representative access to the books and papers of the bankrupts and of the receivers and trustee. The application was therefore never decided. The trustee had in his employ the bookkeeper formerly employed by the bankrupts and could have furnished the requested information quickly, definitely, accurately, completely, and at little or no extra expense. Knauth, Nachod & Kuhne have ascertained the facts as best they could. The Schedules hereto annexed are made a part hereof but they are not exclusive and your orators, Knauth, Nachod & Kuhne, will ask leave
92 to follow their money into any assets that may have come into the hands of the receivers or trustee. They also submit that any assets in the hands of the trustee should be applied to the reimbursement of their $98,005.58, first of all, whether their money be traced into the same or not.

21. Your orators, Knauth, Nachod & Kuhne, the cross-complainants above named, submit themselves to the jurisdiction of the court and are ready and willing to do equity and to abide by the orders, judgments and decrees of the court. The assets of the bankrupts amount approximately to only $1,439,028.05 while their liabilities amount approximately to $5,090,173.84; and your orators, Knauth, Nachod & Kuhne, have no adequate remedy at law.

To the end therefore that your orators, the above named cross-complainants, the said Knauth, Nachod and Kuhne, may have that relief which they can only obtain in a court of equity and that the defendants above named may answer the premises (but not upon oath or affirmation, an answer upon oath being hereby expressly waived by your orators), they now pray the court:

1. That this bill be heard and determined as an amended cross-bill together and in conjunction with the bill of complaint as amended in said suit by Clarence E. Frost and William S. Lovell as receivers and Joe T. Gibson as creditor of the estate of Knight, Yancey & Company and the supplemental bill of complaint by William S. Lovell as trustee in bankruptcy of Knight, Yancey & Company, both against Latham & Company and others, the said suit being known as No. 279 in this court.

2. That the defendants John W. Knight, William J. Yancey, William D. Nesbitt and Robert H. Nesbitt, composing the firm of Knight, Yancey & Company, be declared, adjudged and decreed to have received the said sum of ninety-eight thousand and five dollars and fifty-eight cents ($98,005.58) of your orators, the said Knauth, Nachod & Kuhne, during the period between the 5th and 18th days of April, 1910, or at about that time and to have held the same as the money and property of your orators, Knauth, Nachod & Kuhne.

93 3. That the defendants John W. Knight, William J. Yancey, William D. Nesbitt and Robert H. Nesbitt, composing the firm of Knight, Yancey & Company, and the defendants Clarence E. Frost and William S. Lovell, as receivers in bankruptcy of the estate of Knight, Yancey & Company, (so far, if at all, as they have not been succeeded by the trustee), and the defendant William S. Lovell, as trustee in bankruptcy of the estate of Knight, Yancey & Company, render an account for the said sum of $98,005.58 and set forth a full, true and particular account of all and singular the cotton or other property purchased, either in whole or in part, with said money or any part thereof; said account to set forth the marks of the cotton and a description of any other property purchased with said money, or any part thereof; said account to set forth also what has become of said cotton, or other property, and the persons, firms, or corporations into whose hands or under whose control the same has come; said account to set forth also whether any such cotton or other property or the proceeds thereof has come into the hands or under the control of the said receivers or trustee and, if so, what disposition has been made thereof; said account to set forth also the quantity and value of said cotton or other property coming into the hands or under the control of said receivers or trustee and whether any claims have been made against the same and, if so, what claims and the disposition made thereof; said account to set forth also whether any and, if so, what part of such cotton or other property or the proceeds thereof is now in the hands of or under the control of said bankrupts or said receivers or trustee or other parties known to them; said account to be accompanied also with a statement of all cotton coming into the hands of said receivers or trustee, setting

forth in detail the number of bales, marks, place where received and disposition thereof.

4. That the transfer, or any attempted transfer, by said Knight, Yancey & Company to the said Latham & Company of the cotton mentioned in the bill of complaint in suit and in Schedules 5, 6 and 7 hereto annexed, or any other property purchased, either in whole or in part, with the money or with the proceeds of the money of your orators, Knauth, Nachod & Kuhne, be adjudged invalid and void and of no effect, as against your orators, Knauth, Nachod & Kuhne.

94 5. That the defendants John W. Knight, William J. Yancey, William D. Nesbitt and Robert H. Nesbitt, composing the firm of Knight, Yancey & Company, and the defendants Clarence E. Frost and William S. Lovell as receivers in bankruptcy of the estate of Knight, Yancey & Company, and the defendant William S. Lovell as trustee in bankruptcy of the estate of Knight, Yancey & Company, be decreed to have held said money and the proceeds thereof, and any credits, bonds, property or rights, into which the same or any part thereof may have been converted or which may have been substituted therefor, in trust for the use and benefit of your orators, Knauth, Nachod & Kuhne; that your orators Knauth, Nachod & Kuhne, be subrogated to any right, title and interest which the said receivers or trustees may have in any and all cotton or credits or bonds or other property or rights into which the said money or any part thereof may have been converted or which may have been substituted therefor; that your orators, Knauth, Nachod & Kuhne be subrogated to any rights which the said receivers or trustee or the said complainant Joe T. Gibson or any one else may have under the said bonds of Latham & Company and the American Surety Company mentioned in the annexed Schedules 5 and 6, and also under the said bond of Th. Ruhne and Isidore Newman & Son, mentioned in Schedule 11; that all said money and cotton and rights, including the said bonds and any other bonds that may have been furnished, be impressed with a lien and with a trust for the benefit of your orators, Knauth, Nachod & Kuhne, to the amount of $98,005.58 and interest thereon at 8 per cent. per annum, the legal rate in Alabama, from the 18th day of April, 1910; and that the court enforce the execution of said trust by decreeing the payment of said sum by the said Latham & Company and American Surety Company, on account of said bond, and by the said receivers and trustee, out of property in their hands, to your orators, Knauth, Nachod & Kuhne, payment by etiher to be sufficient and the amount or balance of said bonds, not paid to your orators, to be paid to the said trustee.

6. That your orators, Knauth, Nachod & Kuhne have such other, further and different relief as justice, equity and the nature of the circumstance of the case may require.

95 7. That it may please your honors to grant to your orators, Knauth, Nachod & Kuhne, a writ of subpœna to be directed to the said Edmond Latham, Charles Latham, Raoul Latham, American Surety Company of New York, Clarence E. Frost and William S. Lovell as receivers in bankruptcy of the estate of Knight, Yancey

& Company, John W. Knight, William J. Yancey, William D. Nesbitt, Robert H. Nesbitt, and William S. Lovell as trustee in bankruptcy of the estate of Knight, Yancey & Company, thereby commanding them and each of them at a certain time and under certain penalty, to be therein set forth, to appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as shall seem meet and agreeable to equity and be made against them or any of them in the premises; and, in case the marshal make return that any of said defendants are not to be found within the jurisdiction where such subpœna can be served, that an order or decree be made and entered directing that service thereof be made upon the solicitors of such defendants as have appeared in this suit and by publication, in a manner to be prescribed according to law, upon any others; or directing that service be made in such other manner as the court shall direct.

8. That the writs, orders and other process issued on your orators' original cross-bill be deemed to have been issued on this amended cross-bill; that all parties who have appeared or been otherwise subjected to the jurisdiction of the court pursuant to the prayer of the original cross-bill be held subject to said jurisdiction under this amended cross-bill; and that an order be granted directing all the defendants above named to answer this amended cross-bill within a time fixed in the order.

9. That an order be entered discontinuing this cross-suit as to the Louisville & Nashville Railroad Company.

And your orators, Knauth, Nachod & Kuhne will ever pray.

KNAUTH, NACHOD & KUHNE,
*Complainants.*

STEVENS & LYONS,
*Solicitors and Counsel for Complainants,*
*503 City Bank Building, Mobile, Alabama.*
BRIESEN & KNAUTH,
*Of Counsel for Complainants,*
*25 Broad St., New York, N. Y.*

96 STATE OF NEW YORK,
*County of New York:*

Arend H. Weingardt, being duly sworn, says: That he is a member of the firm of Knauth, Nachod & Kuhne and signed the foregoing amended cross-bill in the name of his said firm; that the complainants are co-partners pleading together, and that he is authorized to make and does make this verification on behalf of his copartners, as well as on behalf of himself; that he has read the foregoing amended cross-bill and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters, he believes it to be true.

AREND H. WEINGARDT.

Sworn to before me this 16th day of December, 1910.

[L. S.] FRANK F. KIRKPATRICK,
*Notary Public, New York County.*

## SCHEDULE 1.

Cotton received by Knight, Yancey & Co., (during the period from the 5th to the 18th day of April, 1910, or at about that time), and paid for out of moneys belonging to, and bank credits that were subject to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | Marks. |
|---|---|
| 100 | QURO |
| 15 | PNCE |
| 15 | PNFT or PWIT or PWTT |
| 15 | PCON |
| 15 | QURR |
| 15 | QLLE |
| 15 | QTOF |
| 15 | QEUS or QEOS |
| 15 | QRDQ or QRDA |
| 15 | QSEI |
| 100 | QUKE |
| 100 | PION |
| 97 100 | PMMT |
| 186 | TTT |
| 73 | ARA |
| 25 | DDD |
| 47 | YGH |
| 117 | NEH or NEL |
| 111 | XCX |
| 63 | FKC |
| 11 | KID |
| 100 | RULE |
| 100 | PLAT |
| 100 | QABO |
| 100 | RACK |
| 100 | QACT |
| 100 | ROAT |
| 100 | RSLX |
| 100 | ROCE |
| 100 | RIDT or RFDT |
| 100 | PITY or PETY |
| 100 | PETV |
| 100 | POLE (Mobile) |
| 22 | PUSS |
| 34 | OMEG |
| 28 | FROM |
| 68 | VBSO |
| 26 | TVAV |
| 85 | JDNA |
| 27 | TOLB |
| 44 | SWST |
| 24 | TSUN |

| | |
|---|---|
| 54 | PLAT |
| 81 | OATS |
| 59 | FUME |
| 100 | QSGZ |
| 100 | RLNI |
| 100 | QSNO |
| 100 | RSGA |
| 100 | PSPI |
| 100 | QEES |
| 100 | PDRE |
| 100 | QSRO |
| 98 50 | RSVI |
| 27 | TSGE |
| 46 | QFEC |
| 50 | REKO |
| 15 | QFID |
| 25 | RQWX or ROWX or RAWX |
| 15 | QIFA |
| 100 | QPPD |
| 100 | QILM or QELM |
| 100 | QALE |
| 100 | QYDI |
| 100 | QICK or QECK |
| 100 | QSGQ |
| 58 | PORK |
| 118 | OWNS |
| 145 | FERD |
| 15 | QFRO |
| 15 | QBIT |
| 15 | QMAR or OMAR |
| 200 | QSRE |
| 100 | QSDI |
| 100 | PSDY |
| 100 | QSEH or QSEL |
| 100 | PSEX (Mobile) |
| 100 | QSYT |
| 100 | PSCA |
| 100 | QSON |
| 100 | PSPL |
| 100 | QSOH |
| 100 | STLO |
| 100 | QSME |
| 150 | RSHO |
| 100 | RSCO |
| 100 | RSET |
| 100 | QSIN or QSEN |
| 100 | PSEA |
| 100 | PSSE |
| 100 | RSTO or RSIO |
| 150 | QSOP |
| 100 | RSNZ |

| | | |
|---|---|---|
| | 100 | RSKK or RSUK or RSNK |
| 99 | 100 | STPV |
| | 23 | PALS |
| | 63 | ONLY |
| | 75 | FRAM |
| | 100 | APD |
| | 50 | YPZ |
| | 75 | TSGE |
| | 100 | PSDA |
| | 100 | RASS |
| | 100 | RPSS |
| | 100 | RSVV |
| | 100 | RSTP |
| | 49 | TPDO |
| | 100 | TSPG |
| | 100 | TSCI |
| | 100 | TSIC |
| | 25 | PLIA |
| | 25 | POMP |
| | 25 | QEAU |
| | 75 | QHYO |
| | 25 | QEST |
| | 25 | QTRE |
| | 25 | RHER |
| | 150 | RSES |
| | 100 | RSNS |
| | 50 | PSAT |
| | 100 | PSGI |
| | 25 | RLFO |
| | 50 | OSBA |
| | 70 | OSCO |
| | 25 | OSCP |
| | 25 | ROSE |
| | 100 | RLON |
| | 100 | RSBV |
| | 100 | SDON or SPON or SOOM |
| | 100 | TSCZ |
| | 100 | OSYA |
| | 100 | OSLE |
| | 50 | OSSC |
| | 25 | OSLA |
| | 50 | OSEA |
| 100 | 30 | RSUL |
| | 50 | RSSS |
| | 50 | RSIL or RSEL |
| | 100 | OSNS |
| | 200 | FAT |
| | 100 | AIP |
| | 80 | RSUG |
| | 40 | RSTH |
| | 80 | RSHT |

| | | |
|---|---|---|
| | 40 | SSZS or SSDS |
| | 80 | SSAR |
| | 80 | SSOL |
| | 14 | YOUR |
| | 39 | NEAL |
| | 15 | GRIN |
| | 25 | NITS |
| | 10 | GATE |
| | 64 | POLE (T. & W.) |
| | 90 | OWLL |
| | 97 | FROG |
| | 9 | PILL |
| | 46 | OURY |
| | 57 | FUSE |
| | 14 | NORA |
| | 12 | GARL |
| | 4 | XPZY |
| | 13 | TJLX |
| | 9 | LDID |
| | 10 | YULE |
| | 33 | NOPE |
| | 50 | NELL |
| | 6 | GIRL |
| | 3 | YEWS |
| | 45 | NIGG |
| | 18 | GUMS |
| | 140 | PXIR |
| | 297 | AVVY |
| | 93 | ISIS |
| | 8 | UTPO |
| | 137 | CARD |
| | 73 | NONA |
| 101 | 22 | PAID |
| | 5 | MONK |
| | 225 | SJAM |
| | 57 | UXLT |
| | 155 | LVBO |
| | 114 | WJUS |
| | 40 | ISOM |
| | 3 | ATIC |
| | 64 | CREW |
| | 40 | SONY or SONV |
| | 25 | BOOF |
| | 2 | POWS |
| | 3 | YONY |
| | 45 | NOSE |
| | 11 | GVIT |
| | 31 | TJQR |
| | 29 | FSLY |
| | 5 | NTOC |
| | 6 | COWS |

| | |
|---|---|
| 8 | SUSY |
| 10 | WARM |
| 48 | RZBR |
| 13,403 | |

SCHEDULE 2.

Cotton received by Knight, Yancey & Co., and stored at the Gulf Compress, Decatur, or elsewhere, (during the period from the 5th to the 18th day of April, 1910, or at about that time), and paid for to the parties named or others, out of moneys that belonged to and bank credits that were subject to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | | |
|---|---|---|
| 108 | Shipped from Huntsville to Decatur..... | $8,342.21 |
| 3 | Cartwright & Co. at or shipped to Decatur.. | 254.95 |
| 31 | Cartwright & Co. at or shipped to Decatur.. | 2,095.10 |
| 4 | J. S. Kelly, shipped to Decatur (on ac't)... | 125.86 |
| 102 | | |
| 73 | A. G. Henry & Co., shipped to Decatur.... | 4,846.96 |
| 37 | J. E. Butler & Co., shipped to Decatur..... | 2,675.21 |
| 1 | R. N. Cartwright & Co., at or shipped to Decatur ..... | 76.10 |
| 2 | R. N. Cartwright & Co., at or shipped to Decatur ..... | 138.80 |
| 2 | J. T. Jones, shipped to Decatur..... | 119.52 |
| 6 | A. G. Henry & Co., shipped to Decatur.... | 153.86 |
| | C. H. Broadway & Co., shipped to Decatur.. | 76.02 |
| 2 | Cloude, King & Co., shipped to Decatur.... | 152.22 |
| 1 | Mrs. J. D. Wykes, shipped to Decatur..... | 56.00 |
| 8 | F. H. Lightfoot, shipped to Decatur..... | 658.15 |
| 5 | J. P. Gibson, shipped to Decatur..... | 396.97 |
| 100 | F. H. Lightfoot, shipped to Decatur..... | 7,682.40 |
| 100 | F. H. Lightfoot, shipped to Decatur..... | 7,596.30 |
| 12 | Stephenson & Alexander..... | 918.24 |
| 183 | Shipped from Huntsville to Decatur..... | 12,591.70 |
| 1 | J. T. Jones, at or shipped to Decatur..... | 78.05 |
| 100 | F. H. Lightfoot, shipped to Decatur..... | 7,759.15 |
| 16 | J. D. Snodgrass, shipped to Decatur..... | 1,142.93 |
| 644 | F. H. Lightfoot, shipped to Decatur..... | 49,073.68 |
| 2 | J. T. Jones, shipped to Decatur..... | 139.50 |
| 100 | F. H. Lightfoot, shipped to Decatur..... | 7,731.22 |
| 15 | Claude King & Co., shipped to Decatur.... | 1,104.54 |
| 2 | E. K. Clinn & Co., shipped to Decatur..... | 466.46 |
| 50 | F. H. Lightfoot, shipped to Decatur..... | 3,846.47 |
| 1 | R. N. Cartwright, shipped to Decatur..... | 80.90 |
| 1,609 | | $120,379.47 |

SCHEDULE 3.

Moneys or bank credits paid to the parties named or others, on account of cotton received by Knight, Yancey & Co., and stored at the Gulf Compress, Decatur, or elsewhere, (during the period from the 5th to the 18th day of April, 1910, or at about that time), which moneys or bank credits were subject to a charge in favor of Knauth, Nachod & Kuhne:

| | | |
|---|---|---|
| | A. Polytinsky (on account) | $475.36 |
| 103 | Thompson & Wallace (on account) | 4,010.00 |
| | Huntsville Bank & Trust Co. (bills payable) | 30,685.64 |
| | T. H. Jones & Co | 819.00 |
| | Cotton Commission Company | 2,484.90 |
| | E. C. Snodgrass (on account) | 2,730.02 |
| | E. T. Robertson & Son (on account) | 216.20 |
| | | $41,451.12 |

SCHEDULE 4.

Cotton withdrawn from the Gulf Compress, Decatur, or elsewhere, by Knight, Yancey & Co. (during the period from the 5th to the 18th day of April, 1910), which cotton was subject to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | Marks. |
|---|---|
| 20 | PLEN |
| 15 | RNSG |
| 24 | REMI |
| 20 | RNOU or RNON |
| 100 | TSXS |
| 150 | QSMP |
| 25 | RSSB |
| 15 | QARI |
| 100 | TSST |
| 150 | PSSI |
| 15 | PINS |
| 15 | PNRX or PURX |
| 15 | QFAB |
| 100 | QHEP |
| 100 | RETM |
| 100 | TSAG |
| 100 | PSEX (D. to N. O.) |
| 200 | PIN |
| 100 | QSGA |
| 100 | RSON |
| 100 | RSIE |
| 100 | QNET |
| 104 100 | RUDE |

| | |
|---|---|
| 100 | RWED |
| 100 | QSEB |
| 100 | RSEI or RSEL |
| 25 | RWIN |
| 25 | RGSE |
| 25 | RIBE |
| 25 | RLSM |
| 25 | RANA |
| 100 | RTYA |
| 100 | SNDM |
| 100 | RNOE |
| 150 | RSLE |
| 2,639 | |

SCHEDULE 5.

Cotton claimed by Latham & Company that was sequestrated by the United States Circuit Court for the Southern District of Alabama in this suit and for which a bond was given in the sum of $325,000.00; a part of which cotton is among the bales mentioned or referred to in Schedules 1, 2, 3 and 4; and the bond for which cotton, as well as the proceeds thereof, is subject to a charge in favor of Knauth, Nachod & Kuhne:

| | Bales. | Marks. |
|---|---|---|
| | 100 | Q S U S |
| | 100 | Q S A N |
| | 100 | Q S D C |
| | 100 | R S L I or R S T I |
| | 100 | R S I A |
| | 100 | R S O T |
| | 100 | R S N I |
| | 100 | R S E R |
| | 100 | P S I Z |
| | 100 | P S O L |
| | 100 | P S D Y |
| 105 | 100 | P S O G |
| | 100 | P S E X |
| | 100 | P S S E |
| | 100 | P S C A |
| | 100 | P S P L |
| | 100 | Q S G Q |
| | 100 | Q S X T |
| | 100 | Q S E L |
| | 100 | R S N U |
| | 100 | R S L X |
| | 100 | Q S Y T |
| | 100 | P S E V |
| | 100 | P S E N |
| | 100 | P S G E |

| | |
|---|---|
| 100 | P S O A or P S D A |
| 100 | P S T W |
| 100 | P S R I |
| 100 | P S B A |
| 100 | P S O P |
| 100 | P S F A |
| 100 | P S K O |
| 100 | Q S O T |
| 100 | Q S H O |
| 100 | P S E A |
| 100 | P S D A or P S O A |
| 100 | Q S D W |
| 100 | Q S A D |
| 100 | Q S M E |
| 100 | Q S O H |
| 100 | Q S O N |
| 100 | R S E N |
| 100 | R S X A |
| 4,300 | |

(For other cotton claimed by Latham & Company see Schedules 6 and 7.)

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SCHEDULE 6.

Cotton delivered to the trustee and by him delivered to Latham & Company (pursuant to an order of the United States District Court for the Northern District of Florida, dated July 2, 1910), upon the giving of a bond in the sum of $240,000.00; some of which cotton is among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4 and was subject, as are the bond and the proceeds thereof, to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | New marks. | Old marks. | | Shipper or place of shipment by Knight, Yancey & Co. |
|---|---|---|---|---|
| 100 | QFEC | 46 | QFEC | Knight, Yancey & Co., Selma. |
| | | 25 | JAP | F. F. Jonstone & Co. |
| | | 4 | JIL | Do. |
| | | 25 | JOY | Do. |
| 100 | QIFA | 15 | QIFA | Selma |
| | | 39 | OWFW | Sellers & Orman |
| | | 42 | OJXW | Do. |
| | | 4 | EUHW | Do. |
| 100 | REKO | 50 | REKO | Selma |
| | | 25 | RUTT | C. Gunter Elmore |
| | | 25 | RINO | Do. |
| 100 | QSGA | 100 | QSGA | Decatur |

| | | | | |
|---|---|---|---|---|
| 100 | RLFO | 25 | RLFO | Selma |
| | | 25 | SAD | F. F. Johnstone & Co. |
| | | 25 | SKY | Do. |
| | | 25 | SOX | Do. |
| 100 | RNOU | 20 | RNOU | Decatur |
| | | 7 | AID | F. F. Johnstone & Co. |
| | | 25 | SUE | Do. |
| | | 25 | SEW | Do. |
| | | 23 | SIQ | Do. |
| 107 | | | | |
| 100 | RUSG | 15 | RUSG | Decatur |
| | | 25 | SODJ | C. Gunter Elmore |
| | | 29 | SICW | Do. |
| | | 16 | PLB | F. F. Johnstone & Co. |
| | | 15 | AXKW | Roman Warehouse |
| 100 | REMI | 24 | REMI | Decatur |
| | | 76 | ECPW | Sellers & Orman |
| 100 | PLEN | 20 | PLEN | Decatur |
| | | 65 | PZPO | Thompson & Wallace |
| | | 15 | VIC | F. F. Johnstone & Co. |
| 100 | QARI | 15 | QARI | Decatur |
| | | 49 | KYC | F. H. Lightfoot |
| | | 36 | OSKA | Thompson & Wallace |
| 100 | QFAB | 15 | QFAB | Decatur |
| | | 8 | OSKA | Thompson & Wallace |
| | | 77 | KYC | F. H. Lightfoot |
| 100 | PURX | 15 | PURX | Decatur |
| | | 44 | PZPO | Thompson & Wallace |
| | | 41 | KYC | F. H. Lightfoot |
| 100 | PINS | 15 | PINS | Decatur |
| | | 45 | PZPO | Thompson & Wallace |
| | | 40 | KYC | F. H. Lightfoot |
| 100 | RSON | 100 | RSON | Decatur |
| 50 | RSRE | 37 | FOSS | Thompson & Wallace |
| | | 13 | KYC | |
| 100 | RSAT | 25 | OWL | Thompson & Wallace |
| | | 37 | FRAM | Do. |
| | | 6 | TVAV | Do. |
| | | 7 | QLAS | Do. |
| | | 25 | AGRD | Do. |

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| | | | | |
|---|---|---|---|---|
| 100 | QSTR | 40 | KYC | F. H. Lightfoot |
| | | 16 | TDNA | Thompson & Wallace |
| | | 7 | OAKS | Do. |
| | | 37 | KYC | F. H. Lightfoot |
| 100 | QSGC | 40 | KYC | F. H. Lightfoot |
| | | 3 | TOLB | Thompson & Wallace |
| | | 2 | TOYS | Do. |
| | | 3 | OWLL | Do. |
| | | 36 | OSSO | Do. |
| | | 11 | FOSS | Do. |
| | | 3 | KYC | F. H. Lightfoot |
| 100 | RSIC | 15 | OTTO | Thompson & Wallace |
| | | 3 | JDNA | Do. |
| | | 2 | TOLB | Do. |
| | | 4 | TVAV | Do. |
| | | 44 | CAKS or OAKS | Do. |
| | | 32 | OWNS | |
| 100 | QSLL | 42 | KYC | F. H. Lightfoot |
| | | 25 | PWG | F. F. Johnstone & Co. |
| | | 18 | PVP | |
| | | 7 | JDNA | Thompson & Wallace |
| | | 3 | OWLL | Do. |
| | | 5 | OLAS | Do. |
| 100 | RSOM | 80 | KYC | F. H. Lightfoot |
| | | 20 | JDNA | Thompson & Wallace |
| 100 | QNCE or ONCE | 65 | KYC | F. H. Lightfoot |
| | | 15 | OWFW | Sellers & Orman |
| | | 20 | OLAS | Thompson & Wallace |
| 100 | QSAT (B) or OSAT (B) | 6 | TOLB | Do. |
| | | 12 | SWST | Do. |
| | | 63 | OWNS | Do. |
| | | 19 | KYC | F. H. Lightfoot |

109

| | | | | |
|---|---|---|---|---|
| 100 | PHAL or PWAL | 66 | VBSO | Thompson & Wallace |
| | | 14 | PROS | Do. |
| | | 20 | KYC | F. H. Lightfoot |

| | | | | |
|---|---|---|---|---|
| 100 | QSUR or OSUR | 13 | ONLY | Thompson & Wallace |
| | | 14 | OWLL | Do. |
| | | 10 | FOSS | Do. |
| | | 63 | KYC | F. H. Lightfoot |
| 100 | RSBL | 4 | FRAM | Thompson & Wallace |
| | | 23 | ONLY | Do. |
| | | 40 | FROG | Do. |
| | | 33 | KYC | F. H. Lightfoot |
| 20 | PZLU | 8 | POST | Thompson & Wallace |
| | | 12 | POLE | Do. |
| 25 | QSAT | 25 | ONLY | Thompson & Wallace |
| 20 | PSHE | 20 | KYC | F. H. Lightfoot |
| 20 | PRIK | 4 | POLE | Thompson & Wallace |
| | | 7 | PINT | Do. |
| | | 9 | KYC | |
| 2,635 | | | | |

SCHEDULE 7.

Cotton claimed by Latham & Company, which was delivered to the trustee (pursuant to an order of the United States District Court for the Northern District of Florida, dated July 8, 1910), and sold, and the proceeds (after payment of freight and other charges both on this cotton and the cotton mentioned in Schedule 6) of which are now held by the trustee until the rights of all parties interested therein can be determined; some of which cotton is among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4, and was
110 subject, as are the proceeds thereof, to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | New marks. | Old marks. | | Shipper or place of shipment by Knight, Yancey & Co. |
|---|---|---|---|---|
| 100 | RSMX or RSMI | 14 | FERD | Thompson & Wallace |
| | | 58 | FRAT | Do. |
| | | 28 | FROM | Do. |
| 100 | RSCO | 66 | TOLB or FOLB | Thompson & Wallace |
| | | 34 | OMEG | Do. |
| 100 | RSPZ or RSTZ | 22 | JDNA | Do. |
| | | 5 | POLE | Do. |
| | | 49 | TPDO | Do. |
| | | 24 | TSUN | Do. |

| | | | | |
|---|---|---|---|---|
| 100 | RSCE | 13 | JDNA | Do. |
| | | 87 | FERD | Do. |
| 100 | QSIY or OSIY | 2 | ONLY | Do. |
| | | 52 | OAKS | Do. |
| | | 15 | OPRA | Do. |
| | | 31 | OWLL | Do. |
| 100 | RSEA | 1 | TVAV | Do. |
| | | 3 | SWST | Do. |
| | | 2 | YBSO or VBSO | Do. |
| | | 16 | FRAM | Do. |
| | | 11 | POST | Do. |
| | | 33 | PORK | Do. |
| | | 20 | PROS | Do. |
| | | 5 | TOLB or FOLB | Do. |
| | | 9 | KYC | F. H. Lightfoot |
| 23 | PALS | 23 | PALS | Thompson & Wallace |
| 111 | | | | |
| 50 | POST or PSOT | 50 | POST | Do. |
| 40 | PINT or PENT | 40 | PINT | Do. |
| 15 | OPRA | 15 | OPRA | Do. |
| 2 | KYC | 2 | KYC | F. H. Lightfoot |
| 29 | XX | 29 | XX | Parker Mer. Co. |
| 57 | FUSE | 57 | FUSE | Thompson & Wallace |
| 9 | PILL | 9 | PILL | Do. |
| 81 | OATS | 81 | OATS | Do. |
| 59 | Fume or FUNE or FOME | 59 | FUME or FUNE or FOME | Do. |
| 965 | | | | |

## SCHEDULE 8.

Cotton at Pensacola claimed by Westphalen & Company (through Scheuch & Company), the proceeds of which have been received by the trustee (except the 100 bales marked QHYO or GHYO, replevied by the Peoples Bank & Trust Company of Selma, Alabama); some of which cotton is among the cotton mentioned in Schedules 1, 2, 3, and 4, and is subject to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | Marks. | Original marks. | | Shipper or place of shipment. |
|---|---|---|---|---|
| 100 | QLEF | 50 | QLEF | Knight, Yancey & Co., Selma. |
| | | 50 | QLEF | Thompson & Wallace |
| 112 | | | | |
| 50 | PBRA | 12 | PBRA | Knight, Yancey & Co., Selma. |
| | | 38 | PBR | Thompson & Wallace |
| 100 | PINC | 63 | PINC | Knight, Yancey & Co., Selma. |
| | | 37 | PINC | Thompson & Wallace |
| 100 | QTRI | 25 | QTRI | Knight, Yancey & Co., Selma. |
| | | 75 | OTRI or QTRI | Thompson & Wallace |
| 100 | QEST or QUST | 25 | QEST | Knight, Yancey & Co., Selma. |
| | | 75 | QEST | Thompson & Wallace |
| 100 | QEAU | 25 | QEAU | Knight, Yancey & Co., Selma. |
| | | 75 | QEAU | Thompson & Wallace |
| 100 | PNCE | 15 | PNCE | Knight, Yancey & Co., Selma. |
| | | 85 | PNCE | Do. Mobile. |
| 100 | PWIT or PNFT or PWTT | 15 | PWIT, etc. | Do. Selma. |
| | | 85 | PWIT | Do. Mobile. |
| 100 | QURR or OURR | 15 | QURR or OURR | Do. Selma. |
| | | 85 | QURR or OURR | Do. Mobile. |
| 100 | QEQS | 15 | QEQS | Do. Selma. |
| | | 85 | QEQS | Do. Mobile. |
| 100 | QTOF | 15 | QTOF | Knight, Yancey & Co., Selma. |
| | | 85 | QTOF | Do. Mobile. |

| | | | | | |
|---|---|---|---|---|---|
| 100 | PCON | 15 | PCON | Knight, Yancey & Co., | Selma. |
| | | 85 | PCON | Do. | Mobile. |
| 100 | QLLE | 15 | QLLE | Knight, Yancey & Co., | Selma. |
| | | 85 | QLLE | Do. | Mobile. |
| 113 | | | | | |
| 100 | QSEI or QSEZ | 15 | QSEI or QSEZ | Do. | Selma. |
| | | 85 | QSEZ or QSEI | Do. | Mobile. |
| 100 | QRDA | 15 | QRDA | Do. | Selma. |
| | | 85 | QRDA | | Mobile. |
| 100 | PGFA or PFGA | 25 | PGFA or PFGA | Knight, Yancey & Co., | Decatur. |
| | | 75 | PGFA or PFGA | C. Gunter Elmore | |
| 100 | POMP | 25 | POMP | Knight, Yancey & Co., | Selma. |
| | | 75 | POMP | Thompson & Wallace (?) | |
| 100 | PLIA | 25 | PLIA | Knight, Yancey & Co., | Selma. |
| | | 75 | PLIA | Thompson & Wallace | |
| 100 | QHYO or GHYO | 75 | QHYO or GHYO | Knight, Yancey & Co., | Selma. |
| | | 25 | QHYO or GHYO | Thompson & Wallace | |
| 100 | RHER | 25 | RHER | Knight, Yancey & Co., | Selma. |
| | | 75 | RHER | Thompson & Wallace | |
| 1,950 | | | | | |

SCHEDULE 9.

Cotton delivered to the trustee at Pensacola by the Louisville & Nashville Railroad Company, subject to the rights of all parties claiming an interest therein (see contract of July 1, 1910), and sold by the trustee; some of which cotton is among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4 and was subject, as are the proceeds thereof, to a charge in favor of Knauth, Nachod & Kuhne:

| | | | | |
|---|---|---|---|---|
| 75 | QSOW | 8 | QSOW | Thompson & Wallace |
| | | 5 | TVAV | Do. |
| | | 19 | FRAM | Do. |
| | | 7 | TOYS | Do. |
| | | 36 | KYC | F. H. Lightfoot |

| | | | | |
|---|---|---|---|---|
| 114 | | | | |
| 80 | QSRT | 40 | KYC | Do. |
| | | 6 | FRAM | Thompson & Wallace |
| | | 19 | FERB | Do. |
| | | 15 | FOSS | Do. |
| 40 | RSFL or QSZL | 40 | KYC | Do. |
| 50 | RSRE | 12 | OWNS | Thompson & Wallace |
| | | 38 | KYC | F. H. Lightfoot |
| 50 | SSTH | 50 | KYC | F. H. Lightfoot |
| 75 | RSIN | 75 | KYC | Do. |
| 100 | RSLW | 10 | TVAV | Thompson & Wallace |
| | | 3 | TOLB | Do. |
| | | 7 | SWST | Do. |
| | | 5 | FRAM | Do. |
| | | 2 | TOYS | Do. |
| | | 24 | KYC | F. H. Lightfoot |
| | | 14 | FLOY | Thompson & Wallace |
| | | 35 | FROG | |
| 80 | RSLB | 80 | OTTO | Thompson & Wallace |
| 75 | RSUI | 75 | KYC | F. H. Lightfoot |
| 80 | PSHE | 80 | KYC | Do. |
| 24 | RSBO | 24 | AMGS | Weil Brothers |
| 50 | RSTE | 16 | RSAL or RSAZ | Peoples W. H. Co. |
| | | 20 | RSAL or RSAZ | Weil Brothers |
| | | 14 | RSAL or RSAZ | Wm. Cunningham |
| 115 | | | | |
| 75 | OSAT or QSAT | 27 | RJON | Thompson & Wallace |
| | | 48 | KYC | F. H. Lightfoot |
| 75 | QSTJ or RSTJ | 75 | KYC | Do. |
| 80 | PRIK | 80 | KYC | F. H. Lightfoot |

| | | | | |
|---|---|---|---|---|
| 40 | QSZL | 4 | JDNA | Thompson & Wallace |
| | | 11 | OWNS | Do. |
| | | 25 | KYC | F. H. Lightfoot |
| 75 | RSMI | 75 | KYC | F. H. Lightfoot |
| 70 | PZLU | 70 | KYC | F. H. Lightfoot |
| 25 | PORK | 25 | PORK | Thompson & Wallace |
| 43 | POLE | 43 | POLE | Do. |
| 22 | PUSS | 22 | PUSS | Do. |
| 1 | KYC | 1 | KYC | F. H. Lightfoot |
| 23 | XX | 23 | XX | Parker Mer. Co. |
| 190 | KYC | 190 | KYC | Hurdle Brothers |
| 46 | OURY | 46 | OURY | Thompson & Wallace |
| 54 | PLAT | 54 | PLAT | Thompson & Wallace |
| 80 | RSUG | | | Knight, Yancey & Co., Mobile |
| 80 | RSHT | | | Do. |
| 80 | SSAR | | | Do. |
| 40 | SSZS | | | Do. |
| 40 | RSTH | | | Do. |
| 80 | SSOL | | | Do. |
| 1,998 | | | | |

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SCHEDULE 10.

Additional cotton received by the trustee from the L. & N. R. R. Co. at Pensacola, except as indicated; which cotton is among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4 and is subject as is the proceeds thereof (or the equity therein, if the banks' liens be prior) to a charge in favor of Knauth, Nachod & Kuhne:

91

| Bales. | Marks. | Old marks. | | Shipper or place of shipment. |
|---|---|---|---|---|
| 6 | OMAR | | | Knight, Yancey & Co., Selma. |
| 100 | QZID or QSID | 15 | QZID or QSID | Knight, Yancey & Co., Selma. |
| | | 85 | AXKW | Roman Cotton Co. |
| | | (100 B C, QZID, were delivered to the Peoples Bank & Trust Co., Selma, pursuant to an order of the U. S. District Court, at Pensacola, dated June 27, 1910.) | | |
| 100 | RAWX or ROWX | 25 | RAWX or ROWX | Knight, Yancey & Co., Selma. |
| | | 25 | RFIT | C. Gunter Elmore |
| | | 25 | RWOJ | C. Gunter Elmore |
| | | 25 | RXCZ | C. Gunter Elmore |
| | | (100 B. C. RAWX, were delivered to the City National Bank, Selma, also pursuant to the said order.) | | |
| 100 | QBIT | 15 | QBIT | Knight, Yancey & Co., Selma. |
| | | 85 | QBIT | C. Gunter Elmore |

SCHEDULE 11.

Cotton released pursuant to an order or decree of the United States District Court for the Eastern District of Louisiana, upon the furnishing of a bond in the sum of $98,500; upon which bond the trustee is prosecuting an action at law in the United States
117 Circuit Court for the Eastern District of Louisiana; and which cotton is included among the cotton mentioned as referred to in Schedules 1, 2, 3 and 4 and was subject, as is also the bond in lieu of it and the proceeds thereof to a charge in favor of Knauth, Nachod & Kuhne:

| Bales. | Marks. |
|---|---|
| 100 | TSAG |
| 100 | PSEX |
| 100 | TSST |
| 100 | TSXS |
| 100 | QSMP |
| 100 | QNET |
| 100 | TSSL |
| 100 | PSSI |
| 150 | TSCZ or PSCZ |
| 100 | TSIC |
| 100 | TSCI |
| 100 | TSPG |
| 100 | SDOM or SOON |
| 1,350 | |

SCHEDULE 12.

Cotton shipped to Chalmette, La., but which the trustee appears to have charged against the Planters & Mechanics (or Merchants) Bank, Uniontown, Alabama; which cotton is among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4 and is subject to a charge in favor of Knauth, Nachod & Kuhne:

| | | |
|---|---|---|
| 100 | Bales; QSLI; Trustee's book value | $7,000.00 |
| 67 | Bales; QSNS; Trustee's book value | 4,690.00 |
| 100 | Bales; QSYA; Trustee's book value | 7,000.00 |
| | | $18,690.00 |

SCHEDULE 13.

Cotton obtained by trustee from New Orleans Terminal Company or others, pursuant to some arrangement between them and to an order of the United States District Court for the Eastern District of Louisiana (as to 100 B. C., RSSA), dated June 28, 1910, in the proceeding against the Steamship Inglefingen; which cotton is among the bales mentioned or referred to in Schedules 1, 2, 3 and 4 and has been sold by the trustee and the proceeds of which are subject to a charge in favor of Knauth, Nachod & Kuhne:

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| | | |
|---|---|---|
| 33 | Bales; QSNS; proceeds of sale | $2,679.95 |
| 100 | Bales; QSRO; proceeds of sale | 7,275.53 |
| 100 | Bales; RSSA; proceeds of sale | 7,489.43 |
| 233 | | $17,444.91 |

SCHEDULE 14.

The cotton obtained by trustee from the New Orleans Terminal Company pursuant to order of United States District Court, Eastern District of Louisiana, dated June 28, 1910, in the proceedings against the Steamship Inglefingen, the same having been sold and the proceeds received by the trustee; which cotton is among the bales mentioned or referred to in Schedules 1, 2, 3 and 4 and the proceeds thereof are subject to a charge in favor of Knauth, Nachod & Kuhne:

| | | |
|---|---|---|
| 100 | Bales; QHEP or OHEP; proceeds of sale | $7,686.03 |
| 100 | Bales; RETM; proceeds of sale | 7,826.37 |
| 200 | | $15,512.40 |
| | Charges deducted by trustee | 986.00 |
| | | $14,526.40 |

SCHEDULE 15.

Moneys or bank credits or other property deposited, with the parties named or others, by Knight, Yancey & Co., (during the period

from the 5th to the 18th day of April, 1910), which moneys or bank credits or other property were subject to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| Moyse & Holmes | $10,000.00 |
| Hayward & Clark | 20,000.00 |
| Hayden, Stone & Company | 15,000.00 |
| 119 E. Moyse & Company | 10,000.00 |
| Carpenter, Baggot & Company | 2,000.00 |
| Morgan County National Bank | 3,000.00 |
| Blum & Hyman | 2,500.00 |
| Union Bank & Trust Co., Pulaski, Tenn. (400 B. C.) | 30,000.00 |
| First National Bank of Decatur (350 B. C.) | 24,500.00 |
| | $117,000.00 |

SCHEDULE 16.

Money or bank credits deposited by Knight, Yancey & Company (during the period from the 5th to the 18th day of April, 1910, or at about that time, as set forth in Schedule 15), that were returned to them and paid out (except what remained on hand, as set forth in Schedule 17), for the cotton mentioned or referred to in Schedules 1, 2, 3 and 4, or some part thereof; the said money, credits or other property and the cotton paid for therewith and the proceeds of said cotton, all being subject to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| Hayward & Clark | $46,513.48 |
| Hayden, Stone & Co | 33,725.00 |
| E. Moyse & Co | 24,000.00 |
| | $104,238.48 |

SCHEDULE 17.

Money, bank credits, broker's credits, and other credits held by Knight, Yancey & Co., at the time of the adjudication of bankruptcy (April 20, 1910), which came into the hands of the receivers and thence into the hands of the trustee, the same being subject to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| Cash on hand | $2,145.00 |
| Peoples Bank, Mobile | 2,828.97 |
| First National Bank, Mobile | 2,205.88 |
| First National Bank, Decatur | 2.44 |
| Morgan County National Bank | 35.42 |
| City Bank, Selma | 5,086.75 |
| Marion Central Bank | 500.00 |
| 120 Peoples Bank, Selma | 188.13 |
| | $12,992.59 |

| | | |
|---|---|---|
| Carpenter, Baggot & Co. | $1,337.50 | |
| Blum & Hyman | 1,415.00 | |
| Moyse & Holmes | 1,959.44 | |
| F. van Gerpen | 5,907.53 | |
| | | 10,619.47 |
| | | $23,612.06 |

SCHEDULE 18.

Cotton held by Knight, Yancey & Co., at the time of the adjudication of bankruptcy (April 20, 1910), which came into the hands of the receivers and was sold by them and the proceeds of which were passed to the trustee; which cotton, or some of it, was among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4; and which proceeds are subject to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| 232 Bales, Decatur | $16,856.70 |
| 561 Bales, So. Ry., Decatur | 42,685.80 |
| 266 Bales, Mobile | 19,097.91 |
| Loose, Mobile | 711.75 |
| | $79,352.16 |

SCHEDULE 19.

Cotton held by banks as pledges of Knight, Yancey & Co., at the time of the adjudication of bankruptcy, which was sold by the banks and the proceeds of which, after payment of the amount due the banks, were passed to the receivers and thence to the trustee; which cotton, or some of it, was among the cotton mentioned or referred to in Schedules 1, 2, 3 and 4; and which proceeds, thus passed to the receivers and trustee, are subject to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| 625 Bales, Decatur | $39,506.08 |
| 10,203 Bales, Mobile | 716,059.37 |
| 500 Bales, Fall River (on acct.) | 31,600.00 |
| 73 Bales, Huntsville | 5,324.97 |
| | $792,490.42 |
| Credited by banks | 567,052.26 |
| Passed to receivers and trustee | $225,438.16 |

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SCHEDULE 20.

Money on bank credits, broker's credits and other credits held by Knight, Yancey & Co., at the time of the adjudication of bankruptcy (April 20, 1910), which have come into the hands of the trustee (in addition to what passed through the hands of the receivers as set forth in Schedules 17, 18 and 19), and have been collected by him and which were subject, as are the proceeds thereof to a charge in favor of Knauth, Nachod & Kuhne:

| | |
|---|---|
| E. Moyse & Co. (per Moyse & Holmes) | $1,653.00 |
| Thompson & Wallace | 1,278.36 |
| Union Bank & Trust Co., Pulaski, Tenn., (compromise) | 16,703.53 |
| | $19,634.89 |

SCHEDULE 21.

Additional cotton, credits or property held by Knight, Yancey & Company at the time of the adjudication of bankruptcy (April 20, 1910) which, or the proceeds thereof, have come into the hands of the trustee; which cotton or property, or some part thereof, was among the cotton or property mentioned or referred to in Schedules 1, 2, 3 and 4, and was subject, as are the proceeds thereof, to a charge in favor of Knauth, Nachod & Kuhne:

| | | |
|---|---|---|
| | Balance on Fall River cotton | $1,964.47 |
| | Balance on New Orleans cotton | 413.13 |
| 7 | Bales, Huntsville | 494.62 |
| 66 | Bales, Selma | 3,906.77 |
| 10 | Bales, Selma | 618.95 |
| | Pickings, Selma | 4.48 |
| 40 | Bales, Decatur | 2,735.15 |
| 111 | Bales, Mobile (on acct. of) | 82,145.31 |
| 45 | Bales, Pensacola (on acct. of) | 3,000.00 |
| 38 | Bales, Mobile (on acct. of) | 2,245.78 |
| 1 | Bale, Mobile (short, paid by compress) | 70.80 |
| 3,902 | Bales, Pensacola (on acct. of) | 34,516.70 |
| 111 | Bales, Mobile | 1,697.83 |
| 4 | Bales, Decatur (damaged and rejected) | 65.17 |
| | | $133,879.16 |

Filed December 20, 1910, by leave of the court.
RICHARD JONES, *Clerk.*

122 *Motion of Complainant to Amend Original Bill by Striking Out Paragraph 4½, etc.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and JOE T. GIBSON
vs.
LATHAM & COMPANY et al.

To the Honorable Judges of the United States Circuit Court in and for the Fifth Circuit of the Southern District of Alabama:

Come Clarence E. Frost and William S. Lovell, as receivers of Knight, Yancey & Company, bankrupts, and Joe T. Gibson, and

move the court that they be allowed to amend their original bill in this cause, by striking therefrom the paragraph numbered 4½, reading as follows, to-wit:

"Your orators are informed and believe and upon such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7,800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of such right, title or interest claimed in and to said seventy-eight hundred (7,800) bales of cotton is unknown to these complainants."

And by striking therefrom the following portion of the prayer of said bill as follows, to-wit:

"That all firms, persons or corporations who claim any right, title or interest in and to said seventy-eight hundred (7,800) bales of cotton be made parties defendant to this bill and be cited by publication to answer this bill."

Which said portions of said bill sought to be stricken therefrom by amendment were inserted in said bill by the amendment filed May 5th, 1910, and allowed by the court on the same day.

123 Movants show to the court that said portions of said bill, now sought to be stricken, were inserted in said bill because of information which reached complainants to the effect that the cotton, the subject matter of this suit, was claimed by a bank in France, under and by virtue of a transfer from Latham & Company; and, desiring to save the necessity of litigating the same question involved in this suit with such bank, complainants caused said portions of said bill to be inserted therein by way of amendment.

Complainants further show to the court that said portions of said bill have been seized upon by Knauth, Nachod & Kuhne as an excuse for seeking to have themselves made parties to this cause with a view of having litigation in this court not germane to the matters set forth in the original bill.

CLARENCE E. FROST,
WILLIAM S. LOVELL,
*As Receivers in Bankruptcy of Knight, Yancey & Company, Bankrupts,*
By PERCY, BENNERS & BURR,
*Their Attorneys.*
JOE T. GIBSON,
By PERCY, BENNERS & BURR,
*His Attorneys.*
PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Attorneys for Complainants.*

STATE OF ALABAMA,
*Jefferson County:*

William S. Lovell being duly sworn deposes and says that he is receiver in bankruptcy of Knight, Yancey & Company, bankrupts,

and is one of the parties to the original bill; and that the averments of the above and foregoing are true; and that the averments of the bill as proposed to be amended are true as therein stated.

WILLIAM S. LOVELL.

Subscribed and sworn to before me, this the 10th day of January, 1911.

DAVID B. ADAMS,
*Notary Public.*

124 To Messrs. Howe, Fenner, Spencer & Cocke, Solicitors for Latham & Company:

To Messrs. Stephens & Lyons and Messrs. Brieson & Knauth, Solicitors for Knauth, Nachod & Kuhne:

Please take notice that the foregoing motion to amend will be presented to the court, and its allowance asked, on the 21st day of January, 1911.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Clarence E. Frost and William S. Lovell, as Receivers in Bankruptcy of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson.*

Filed Jan'y 21, 1911.

RICHARD JONES, *Clerk.*

*Motion of Lovell, Trustee, Complainant, to Strike from the File the Answer of Knauth, Nachod & Kuhne to Bill of Complaint and to Strike from the File the Cross-bill and Amended-Cross-bill of Knauth, Nachod & Kuhne.*

In the Circuit Court of the United States for the Southern District of Alabama, Fifth Circuit, Southern Division.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupts,
vs.
LATHAM & COMPANY et al.

Comes William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, bankrupts, who, heretofore, in this cause exhibited his supplemental bill against Latham & Company, and appears specially for the purpose of making this motion, and for no other purpose, and separately moves the court to strike from the
125 file in this cause, the paper purporting to be an answer of Knauth, Nachod & Kuhne to the original bill in this cause, and the paper purporting to be the cross-bill of Knauth, Nachod & Kuhne, exhibited in this cause, and the paper purporting to be the amended cross-bill of Knauth, Nachod & Kuhne, exhibited in this cause, on the following grounds:

First.

That he is a resident of the Northern District of Alabama, and that none of the persons composing the bankrupt partnership of Knight, Yancey & Company reside or resided within the Southern District of Alabama; and that the principal place of business of said Knight, Yancey & Company was not within the Southern District of Alabama; and that no valid personal service of a subpœna to said William S. Lovell, trustee, has been had, or can be had, to answer said cross-bill, either in its original form or as sought to be amended; nor is there now, nor was there at the time said answer and said papers purporting to be a cross-bill filed in this cause, any property, the subject matter of this suit, within the jurisdiction of this court; and that no valid order of publication can be made in this cause requiring the said Lovell, trustee, to answer said cross-bill.

Second.

Because this court is without jurisdiction to hear and determine the matters and things set forth in said cross bill, or petition of intervention, in the absence of voluntary appearance thereto by the said Lovell, trustee; and that the said Lovell, trustee, has not voluntarily appeared to plead to the said cross bill, or petition of intervention.

Third.

Because said answer and said cross-bill, in the original and amended form, are impertinent.

Fourth.

Because said cross-bill in its original and amended form seeks to introduce into this cause, matters that are distinct from, independent of, and have no connection with those shown by said cross-
126 bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as cannot properly be litigated or investigated in this suit, but only in a suit or proceeding separate from and independent of this cause.

Fifth.

Because the matters sought to be introduced into this cause by said cross-bill in its original and amended form, if included in the original bill of complaint filed in this cause would have rendered it subject to demurrer for multifariousness, as joining distinct and disconnected matters in one suit.

Sixth.

Because the right, title or interest of Knauth, Nachod & Kuhne in or to the cotton, or any of the cotton involved in this litigation, cannot be properly investigated or inquired into in this proceeding.

Seventh.

Because by said answer and said cross-bill, or petition of intervention, said Knauth, Nachod & Kuhne seek to split up the cause of action claimed by them, and litigate such claim in part in this suit, and in part in other suits or proceedings.

Eighth.

Because it does not appear from the pleadings in this cause that said Knauth, Nachod & Kuhne were parties by name or reference to the bill in this cause; and it does not appear that the consent of the parties to this cause was obtained to their attempt at an appearance herein.

Ninth.

Because there is no equity in said cross-bill.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupts.*

We certify that in our opinion the foregoing motion is well taken in point of law.

PERCY, BENNERS & BURR,
*Solicitors for William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupts.*

Filed Jan'y 21, 1911.

RICHARD JONES, *Clerk.*

127 *Appearance of Latham & Company as to Hearing on Motion to Strike Answer of and Cross-bill of Knauth, Nachod & Kuhne.*

In the Circuit Court of the United States for the Southern District of Alabama, Southern Division.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY et al., Respondents.

Come now Latham & Company, defendants in the above entitled and numbered cause, through their undersigned solicitors, and in response to the notice served upon them that on Saturday the 21st

day of January, 1911, there will be a hearing upon the motions of the complainants to amend their original bill in this cause by striking therefrom the paragraph numbered 4½, reading as follows, to-wit:

"Your orators are informed and believe and upon such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of such right, title or interest claimed in and to said seventy-eight hundred (7800) bales of cotton is unknown to these complainants."

And by striking therefrom also the following portion of the prayer of the said bill, to-wit:

"That all firms, persons, or corporations who claim any right, title or interest in and to said seventy-eight hundred (7800) bales of cotton be made parties defendant to this bill and be cited by publication to answer this bill."

And to strike from the file in this cause the paper purporting to be an answer of Knauth, Nachod & Kuhne to the original bill in this cause, and the paper purporting to be the cross-bill of Knauth, Nachod & Kuhne exhibited in this cause, and the paper purporting to be the amended cross-bill of Knauth, Nachod & Kuhne
128 exhibited in this cause, copies of which said proposed motions have been furnished to movers:

Respectfully show to the court:

That these appearers have no objection to offer to the allowance by the court of either of the said motions, or to the hearing thereon being had on Saturday the 21st day of January, 1911, or upon any other date to which the court may see fit to adjourn the said hearing.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Company.*

Filed Jan'y 21, 1911.

RICHARD JONES, *Clerk.*

*Opinion of Toulmin, Judge, on the Motion to Strike Cross-bill of Knauth, Nachod & Kuhne.*

Circuit Court of the United States for Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers of Knight, Yancey & Company, Bankrupts, and Joe T. Gibson, Complainants,

vs.

LATHAM & COMPANY, a Partnership, et al., Respondents.

On Motion to Strike Cross-Bill, as Amended, of Knauth, Nachod & Kuhne.

Percy, Benners & Burr, Rich & Hamilton, for Complainants.
Briesen & Knauth, Stevens & Lyons, for Cross-complainants.

Toulmin, District Judge.

A cross-bill is generally considered as a defence to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation.

Story's Equity Pldg., Sec. 399.

"A bill of this kind is usually brought, either (1) to obtain
129 a necessary discovery of facts in aid of the defence to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill."

Story's Equity Pldg., Sec. 399.

New and distinct matters are intrdouced by the cross-bill in this case which are not embraced in the original. The subject of the original and cross-bill is not the same.

A cross-bill is merely auxiliary to—a dependency upon, and a part of the original suit. Its subject matter must be essentially connected with that of the original bill, and not extraneous thereto.

Springfield Manfg. Co. vs. Bernard et al., 81 Fed., 261.
Bates Fed. Prac., No. 386.

The court in that case said:

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. * * * The issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that the cross suit is a mere auxiliary or dependency upon the original suit."

As I understand the cross-bill in this case, it seeks an accounting with Knight, Yancey & Co., the bankrupts, and claims that on such sum as may be recovered in this suit the complainants in said cross-bill have a lien, and that the same should be so decreed by this court.

In my opinion, said cross-bill cannot be considered as a defence to the original bill, or as a proceeding necessary to a complete determination of the matter in litigation in the original bill. It is not auxiliary to or a dependency upon this suit and not essentially connected with the original bill therein.

Springfield Mfg. Co. vs. Bernard et al., 81 Fed., 261; 53 Fed., 850; 46 Fed., 851.

130 This suit is one in which the trustee in bankruptcy, representing all the creditors of the bankrupt's estate, seeks to recover property or a fund, which it is claimed was preferentially transferred to the defendants, Latham & Co., by the bankrupts, Knight, Yancey & Co., in payment of an alleged indebtedness to said Latham & Co. The fund, if recovered, is not to be administered in this court, but in the bankrupt court. This suit is in the name of the trustee in bankruptcy and he seeks to avoid the alleged preferential transfer, and to recover the said fund to be administered by the bankrupt court. If recovered in this court, it is to be turned over to that court as a part of the bankrupt estate. That court being then in the actual possession of the fund for administration will draw to it the right to decide upon conflicting claims thereto. If the alleged preferential transfer is avoided, and the trustee recovers the fund sued for, it then becomes a part of the assets of the bankrupt state in the possession of, and in the course of administration by the bankrupt court.

All persons entitled to participate in said assets, or claiming a lien thereon, may come into that court, and, under the jurisdiction acquired by the proceeding in bankruptcy, have the rights adjudicated.

The motion to dismiss the said cross-bill is granted; and it is hereby ordered that said cross-bill be, and the same is hereby, stricken out.

Filed March 21, 1911.

RICHARD JONES, *Clerk.*

131 *Decree Striking from File the Answer of Knauth, Nachod & Kuhne to Original Bill and Striking from File the Cross-bill and Amended Cross-bill of Knauth, Nachod & Kuhne.*

Circuit Court of the United States for the Southern District of Alabama, November Term, 1910.

In Equity. No. 279.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company,
vs.
LATHAM & COMPANY et al.

This cause having been argued and submitted on the motions of complainant William S. Lovell, trustee, to strike out and from the file the answer of Knauth, Nachod & Kuhne to the original and amended bill of complaint, and the cross-bill and amended cross-bill filed by Knauth, Nachod & Kuhne; and the same being duly considered by the court, it is ordered and decreed by the court that said answer and said cross-bill and amended cross-bill be and the same are hereby stricken out and from the file herein at the cost of said Knauth, Nachod & Kuhne.

Made this 21st day of March A. D. 1911.

HARRY T. TOULMIN, *Judge.*

Filed and entered March 21, 1911.

RICHARD JONES, *Clerk.*

*Decree Allowing Complainant to Amend Original Bill by Striking Therefrom Paragraph Numbered 4½, etc.*

Circuit Court of the United States for the Southern District of Alabama, November Term, 1910.

In Equity. No. 279.

WILLIAM S. LOVELL, Trustee, et al.
vs.
LATHAM & COMPANY et al.

This cause having been submitted on the motion of com-
132 plainants to be allowed to amend the original bill herein by striking out and from said bill the paragraph numbered 4½; and by striking from said bill that portion of the prayer thereof, as follows: "That all firms, persons or corporations who claim any right, title or interest in or to said 7,800 bales of cotton be made parties defendant to this bill and be cited by publication to answer this bill," which portions of said bill appear by the amendment thereto filed on May 5th, 1910. It is ordered by the court that said

motion be and the same is hereby granted and that said portions of said bill be and the same are hereby stricken out and from the said bill.

This March 21st, A. D. 1911.

HARRY T. TOULMIN, *Judge.*

Filed and entered March 21, 1911.

RICHARD JONES, *Clerk.*

*Assignment of Errors by Knauth, Nachod & Kuhne.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

CLARENCE E. FROST and W. S. LOVELL, as Receivers, and JOE T. GIBSON, Complainants,
vs.
LATHAM & COMPANY, a Partnership, et al., Respondents.

In Equity. No. 279.

FRIEDRICH NACHOD and Others, Complainants,
vs.
LATHAM and Others, Defendants.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee, Complainant,
vs.
LATHAM & COMPANY, a Partnership, Respondent.

The defendants and ancillary, cross or other complain-ts (Friedrich Nachod, Max Jaffe, Wilhelm Knauth, August Stern,
133 Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth, and Percival Kuhne, composing the co-partnership firm of Knauth, Nachod & Kuhne), being about to ask for the allowance of an appeal from the order and decree herein (to the effect, among other things, that their "said answer and said cross-bill and amended cross-bill be and the same are hereby stricken out and from the file herein at the cost of said Knauth, Nachod & Kuhne"), made and entered on or about March 21, 1911, do hereby make the following assignment of errors in said decree and in the proceedings of court:

1. The circuit court erred in striking out the answer and bill of Knauth, Nachod & Kuhne, whether said bill be characterized as a cross-bill or as an ancillary or other original bill. The court had seized and sequestered property that belonged to them. It had thereby prevented them from following said property and invoking the aid of any other tribunal in asserting their right to the same.

It had then permitted the original complainant, the said receivers and Gibson, to make all persons, claiming an interest in said property, parties hereto and to cite them to answer their bill. It had then permitted a bond to be substituted in lieu of said property, conditioned that the property would be forthcoming to answer the final decree of the court in this suit. Being thus called upon to do so, Knauth, Nachod & Kuhne appeared and answered the bill of said complainants and were permitted by the court to file their own bill herein. Their answer and bill have now been stricken out, and they have been decreed to pay costs for doing what the court had permitted the said original complainants call upon them to do. It is submitted that the said order or decree, striking out the answer and bill of Knauth, Nachod & Kuhne with costs against them, deprives them of their property contrary to law, contrary to equity and without due process of law and denies to them the equal protection of the laws; and, therefore, that it is in contravention, among other things, of Article V and Article XIV of the amendments to the constitution of the United States.

2. The circuit court erred in treating the bill of Knauth, Nachod & Kuhne as a suit for an accounting. They brought their
134 suit on the theory that property belonging to them had been seized and sequestered by the court and that they were called upon to present to the court any claim they might have to such property; and on the further theory that, even if they had not been expressly called upon to do so, they were entitled to ask a court of equity, having possession of their property, to protect and enforce their rights therein; and on the further theory that all other tribunals were closed to them when the circuit court took possession of the property and that the bond stands in place of the property and that the decree releasing it is a bar to a suit to recover the same in any other court; and on the further theory that when a court of equity acquires jurisdiction of the res of a controversy, its jurisdiction excludes that of all other tribunals. An accounting by the bankrupts and the trustee was asked for merely as a convenient and proper means of establishing the title of Knauth, Nachod & Kuhne to the property in question and of determining the rights, if any, of all other parties therein. But the bill was drawn with a view to making all necessary proof, whether an accounting should be decreed or not. It is submitted, however, that Knauth, Nachod & Kuhne should not have been turned out of court, even if they had asked for too much or too little or the wrong relief.

3. The circuit court erred in treating the bill of Knauth, Nachod & Kuhne distinctively and exclusively as a pure cross-bill. They filed their bill expressly as "their amended cross-bill of complaint (or their petition or bill of complaint in intervention, if the court hold that it should be so denominated"). It is submitted that it is clearly of an original and ancillary character, as well as of the nature of a cross-bill. Process thereon was prayed for and issued and served, on some defendants within the district and on the rest without the district as provided by a decree of the court.

4. The circuit court erred in holding that the bill of Knauth, Nachod & Kuhne cannot be considered a defense to the original bill.

The said receivers and Gibson had alleged, among other things, that the property in question belonged to the bankrupt estate and had sought a decree in their favor. Knauth, Nachod & Kuhne
135 alleged that the property, or some part thereof, belonged to them and that their rights were prior and paramount to the rights of the bankrupt estate and sought a decree in their favor. It is submitted that this was a defense to the original bill.

5. The circuit court erred in holding that the bill of Nnauth, Nachod & Kuhne could not be considered a proceeding necessary to a complete determination of the litigation in the original bill. The matter in litigation in the original bill was the property, a part of which had been seized and sequestered by the court, and the right, title and interest therein of all persons. It is true that, as against Latham & Company, the original complainants based title on an illegal preference; but they alleged title and called upon all persons to answer their bill. The property, or part thereof, belonged to Knauth, Nachod & Kuhne. It is submitted that the court could not finally determine either the title or right possession of either Latham & Company or of the original complainants without passing on the rights of Knauth, Nachod & Kuhne.

6. The circuit court erred in holding that the bill of Knauth, Nachod & Kuhne was not auxiliary to or a dependency on this suit and not essentially connected with the original bill. The bill of Knauth, Nachod & Kuhne was filed for the purpose of establishing a right, title and interest in property in the possession or under the dominion and otherwise subject to the jurisdiction of the court in this suit. It is submitted that such bill is auxiliary and ancillary to the suit in which the court has assumed jurisdiction and taken possession, actually or potentially, of the res of the controversy.

7. The circuit court erred in holding that the property of Knauth, Nachod & Kuhne, in its possession or under its dominion, should be turned over to the bankruptcy court or to any other court for administration. No other court has possession or dominion of the property or can hear the claim of Knauth, Nachod & Kuhne thereto and award them the possession thereof. It is submitted that they were not required to await the determination of the litigation, between the original complainants and Latham & Company, and then follow the proceeds, if any, into some other court. It is further sub-
136 mitted that, were the property in the possession of the bankruptcy court, Knauth, Nachod & Kuhne would be entitled to establish their right thereto by a plenary suit in a court of competent jurisdiction, including the United States circuit court. (Sec. 23, Bankruptcy Act.) Knauth, Nachod & Kuhne claim that the property in question belongs to them and that the rights of the trustee are inferior and subject to their rights. They also claim that if the property were in the possession of the bankruptcy court, it would only be entitled to administer the same subject to their rights or by providing adequately for the satisfaction of their interest in the property.

7. The circuit court erred in ignoring the possibility that Latham & Company may succeed as against the trustee. Then the property of Knauth, Nachod & Kuhne will be lost to them, after the court had

sequestered it and allowed a bond to be substituted for it and thereby prevented them from following it and invoking the aid of any other court to obtain it.

8. The circuit court erred in granting the motion of the original complainants, the receivers and Gibson, and thus allowing them to amend their bill by striking out paragraph No. 4½ and the part of the prayer relating thereto, by which they had alleged that there were certain unknown persons who claimed some right, title and interest in the seventy-eight hundred (7800) *hundred* bales of cotton in question, or some parts thereof, and prayed that all persons claiming an interest therein be made parties and cited to answer the original *ball.* Having been thus called upon to do so, Knauth, Nachod & Kuhne had appeared and answered and, by leave of the court, filed their own bill herein in which they asked for affirmative relief. That is to say: Knauth, Nachod & Kuhne were sued to present their claim to the res of the controversy and did so. Then the original complainants' bill was, in effect, discontinued as to them without costs and their answer and bill stricken out with costs against them. Had Knauth, Nachod & Kuhne not been thus sued, they would have filed an original bill expressly of an ancillary and auxiliary character. It is submitted that the original complainants should not have been permitted to thus amend their bill at all, but, if so, it should have been expressly without prejudice to the
137 rights of Knauth, Nachod & Kuhne in the suit and only upon payment of the costs and fees incurred by them.

9. The Circuit Court erred in granting the motion of William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Company, to strike from the file in this cause the answer and bill of Knauth, Nachod & Kuhne. It is submitted that the trustee's remedy, if any, was by demurrer or answer and not by motion and that said motion should have been dismissed on that ground.

10. The circuit court erred in disregarding its own order permitting Knauth, Nachod & Kuhne to file their bill in this cause. No motion was made to vacate said order and no claim has been made that it was irregular in any respect. It stands res adjudicata that said bill was properly filed. It is submitted that the order striking the same from the file of the cause is inconsistent, conflicting and contrary to the orderly administration of justice.

11. The circuit court erred further in striking out the bill of Knauth, Nachod & Kuhne, because the motion was made on grounds that went to the merits of the bill and, in spite of the attempt to appear only specially, constituted a general appearance and subjected the trustee to the personal jurisdiction of the court, apart from the fact that he had already appeared generally in the cause and been substituted as sole complainant therein.

12. The circuit court erred in holding the law against Knauth, Nachod & Kuhne. It is submitted that the decree of the court striking out the bill of Knauth, Nachod & Kuhne is contrary to the admitted facts in the cause, contrary to law and contrary to equity.

Wherefore the defendants and ancillary, cross or other complain-ts, Knauth, Nachod & Kuhne, pray that the said decrees of the

circuit court against them (entered on or about March 21, 1911, striking out their bill and answer, and amending the bill of the original complainants so as to, in effect, discontinue the same as against them) be reversed.

STEVENS & LYONS,
*Solicitors and Counsel for Knauth.*
*Nachod & Kuhne, Mobile, Alabama.*

138 BRIESEN & KNAUTH,
*Of Counsel for Knauth, Nachod & Kuhne,*
*25 Broad Street, New York, N. Y.*

The foregoing assignment of errors was presented with the application for appeal April 19, 1911.

DAVID D. SHELBY,
*U. S. Circuit Judge.*

Filed April 24, 1911.
RICHARD JONES, *Clerk.*

NOTE.—The foregoing assignment of errors on the former appeal in this cause is retained in the transcript of record on this appeal at the request of counsel for appellees Latham & Company and American Surety Company of New York. The decrees reversed on the former appeal are retained so as not to have to reprint or change the paging of the former assignment of errors.

139 *Motion of Edmond Latham et al. to Dismiss Cross-bill of Knauth, Nachod & Kuhne.*

In the United States District Court, Sitting at Mobile.

No. 279. In Equity.

FRIEDRICH NACHOD et al., Complainants in Cross-bill,
vs.
EDMOND LATHAM et al., Defendants.

Come Edmond Latham, Charles Latham and Raoul Latham, respondents in said cross-bill as last amended, and jointly and severally, but without prejudice to or waiver of their demurrer heretofore filed to said amended cross-bill, move to dismiss the said amended cross-bill for the following separate and several grounds, viz:

First. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as cannot properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause.

Second. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein,

and which matters so sought to be introduced herein are such as can not properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause; nor are the rights claimed by complainants in the original bill and those claimed by cross-complainants in the cross-bill the same or of the same class or nature, nor is there any privity between them as to such rights.

Third. Because it is multifarious and the matters sought to
140 be introduced thereby, if included in the original bill of complaint filed in this cause, would have rendered such original bill subject to demurrer for multifariousness as joining distinct and disconnected matters in one suit.

Fourth. Because William S. Lovell is sought to be made a party respondent to this amended cross-bill as trustee in bankruptcy of Knight, Yancey & Company and it is not shown that at the time of the original cross-bill being filed by permission of court, he was a party to this cause as such trustee, thereby seeking to introduce a new party.

Fifth. Because it does not appear from the amended cross-bill but that the complainants therein were not parties to this cause at the time of the filing of their amended cross-bill, nor is it alleged that the consent of any of the then parties to such cause was obtained to such filing or to their coming into it.

Sixth. Because said amended cross-bill fails to allege facts entitling complainants therein to the relief or discovery prayed and seeks to have respondents thereto disclose sufficient facts to so entitle them, if, perchance, such facts there be.

Seventh. Because said amended cross-bill or petition of intervention in a fishing bill.

Eighth. Because the funds alleged in said amended cross-bill to have been fraudulently secured from the complainants therein are not by it certainly or positively identified with or traced into the goods or res relative to which a constructive trust is sought to be established.

Ninth. Because said amended cross-bill fails to specify definitely or positively any property into which it seeks, or may seek, to trace the funds alleged to have been fraudulently secured from the complainants therein.

Tenth. Because there is no equity in said amended cross-bill.

Eleventh. Because the said amended cross-bill is in substance and effect in conflict with and adverse to the rights of the complainants and the cause as made in the original suit to the extent of the whole claim set up in said amended cross-bill.

141 Twelfth. Because said amended cross-bill shows that none of these movants ever had the possession or control of the res relative to which a trust is sought to be established, nor is it shown that they ever will have it.

Thirteenth. Because it is uncertain whether this court ever could afford effective relief as the res is without its jurisdiction and its present possessors are also shown to be without the jurisdiction of this court and the forthcoming bond made by them is shown only

to be to answer the outcome of the decree in the original cause herein.

Fourteenth. Because there was no property in custodia legis, so far as this court is concerned, at the time of the filing of the first paper in this cause by the complainants in the amended cross-bill, and Latham & Company, its possessors, were then without the jurisdiction of this court, the forthcoming bond by them is only to answer the outcome of the decree in the original cause herein and runs only to the parties named in such bond or indicated therein, who are not cross-complainants, and said amended cross-bill was filed too late.

Fifteenth. Because before the amended cross-bill was filed, or any paper by the cross-complainants, and after the invitation by the original complainants or some of them, to answer their bill, the cotton was removed and in its place there was substituted a bond running only to the then complainants, or their successors, which of necessity operated as an amendment of the proceedings so far as to make that clause meaningless and reduce the litigation to only those who should be interested under said bond, and this bond by its very terms had no relation to these cross complainants.

Sixteenth. Because the amended cross-bill is in a double aspect, viz: to enforce a trust in specific property or to charge the estate generally, and in the last aspect has no equity.

Seventeenth. Because the cross-bill is of double aspect in that it seeks recovery whether it can trace or cannot trace funds into the cotton, and in the latter aspect is bad.

Eighteenth. Because the amended cross-bill seeks indemnity from the general estate of the bankrupt.

142 Nineteenth. Because it is uncertain and one cannot tell whether the amended cross-bill seeks to establish a claim upon the specific cotton involved in the original suit or to be indemnified from the general estate of the bankrupt.

Twentieth. Because it is repugnant in that it claims to disaffirm the use of its funds and to affirm same by tracing funds into the cotton involved in the original suit.

Twenty-first. Because it sets up matter irrelevant in the original cause.

Twenty-second. Because respondents to the original bill, Latham & Company, never gave their consent to the amendment to the bill inviting others into the litigation, nor consented to the filing of the original or amended cross-bill or the so-called answer of the cross-complainants.

Twenty-third. Because said amended cross-bill alleges no facts showing that these defendants have in their possession or under their control any cotton in which the said cross-complainant has any right, title or interest whatever, or that the said cross-complainant is entitled to any relief against these cross-defendants, but is filed, so far as these defendants are concerned, for a discovery only, and the said cross-complainant therein hath waived oath or affirmation by these defendants to their answer.

Twenty-fourth. Because cross-complainants declined to ratify the

investments of said money in said cotton and having claimed said money with interest, the said complainants are estopped from asserting any right to the cotton in which said money is alleged to have been invested.

Twenty-fifth. Because the said cross-bill shows upon its face that the said cross-complainants have not elected to follow the proceeds of their money into the said cotton and to claim the cotton itself, but assert only a lien upon the said cotton for the re-payment of their money, although they allege no contract, either express or implied, which could confer upon them a lien upon said cotton.

Twenty-sixth. Because it is impossible to ascertain from the allegations of the said cross-bill, what, if any, cotton that ever went
143 in the possession of these defendants had been purchased with the cross-complainants' money, and what, if any, of said cotton that went into the possession of these defendants is the subject matter of the complainants' alleged rights.

Twenty-seventh. That this court is without jurisdiction to hear and determine the matters and things in said amended cross-bill as therein pleaded and alleged.

Twenty-eighth. That the cross-complainant- had no capacity, power or authority to institute, maintain or prosecute said cross-bill as amended in the form and for the matters and things therein alleged.

Twenty-ninth. That the cross complainants have not in and by said amended cross-bill made and stated any such cause of action as does or may entitle them as is thereby sought and prayed for against and from these defendants.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for Latham & Company.*

STATE OF ALABAMA,
*Mobile County, ss:*

Walker B. Spencer makes solemn oath and says, that he is one of the solicitors for the defendant, Latham & Company, for the purpose of filing the foregoing motion; that he is informed and believes and on such information and belief states the fact to be that none of the members of the said firm are present in the United States, and that the foregoing motion is not interposed for delay.

W. B. SPENCER.

Subscribed and sworn to before me this 25th day of October, 1913.

RICHARD JONES,
*Clerk U. S. District Court,*
*Southern District of Alabama.*

I hereby certify that in my opinion the foregoing motion is well founded in point of law.

W. B. SPENCER,
*Solicitor for the Defendant Latham & Company for the Purpose of Filing This Motion.*

Filed October 25th, A. D. 1913.
RICHARD JONES, *Clerk.*

144 *Motion of Receivers & Trustee in Bankruptcy to Dismiss Cross-bill of Knauth, Nachod & Kuhne.*

In the United States District Court, Sitting at Mobile.

No. 279. In Equity.

FRIEDRICH NACHOD et al., Complainants in Cross-bill,
vs.
EDMOND LATHAM et al., Defendants.

Come Clarence E. Frost and William S. Lovell as Receivers in Bankruptcy of the Estate of Knight, Yancey & Company, and William S. Lovell as Trustee in Bankruptcy for the Estate of Knight, Yancey & Company, as respondents to this cross-bill as last amended, and separately and severally and without prejudice to or waiver of their demurrer heretofore filed to said amended cross-bill, move to dismiss the said amended cross-bill upon the following separate and several grounds, viz:

First. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as can not properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause.

Second. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as can not properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause; nor are the rights claimed by complainants in the
145 original bill and those claimed by cross-complainants in the cross-bill the same or of the same class or nature, nor is there any privity between them as to such rights.

Third. Because it is multifarious and the matters sought to be introduced thereby, if included in the original bill of complaint filed in this cause, would have rendered such original bill subject to demurrer for multifariousness as joining distinct and disconnected matters in one suit.

Fourth. Because William S. Lovell is sought to be made a party respondent to this amended cross-bill as trustee in bankruptcy of Knight, Yancey & Company and it is not shown that at the time of the original cross-bill being filed by permission of court, he was a party to this cause as such trustee, thereby seeking to introduce a new party.

Fifth. Because it does not appear from the amended cross-bill or otherwise but that the complainants therein were not parties to this cause at the time of the filing of their amended cross bill, nor is it

alleged that the consent of the then parties to such cause was obtained to such filing or to their coming into it.

Sixth. Because said amended cross-bill fails to allege facts entitling complainants therein to the relief or discovery prayed and seeks to have respondents thereto disclose sufficient facts to so entitle them if, perchance, such facts there be.

Seventh. Because said amended cross bill or petition of intervention is a fishing bill.

Eighth. Because the funds alleged in said amended cross-bill to have been fraudulently secured from the complainants therein are not by it certainly or positively identified with or traced into the goods or res relative to which a constructive trust is sought to be established.

Ninth. Because said amended cross-bill fails to specify definitely or positively any property into which it seeks, or may seek, to trace the funds alleged to have been fraudulently secured from the complainants therein.

Tenth. Because there is no equity in said amended cross-bill.

Eleventh. Because the said amended cross-bill is in substance and effect in conflict with and adverse to the rights of the com-
146 plainants and the cause as made in the original suit to the extent of the whole claim set up in said amended cross-bill.

Twelfth. Because said amended cross-bill shows that none of these movants ever had the possession or control of the res relative to which a trust is sought to be established, nor is it shown that they ever will have it.

Thirteenth. Because it is uncertain whether this court ever could afford effective relief as the res is without its jurisdiction and its present possessors are also shown to be without the jurisdiction of this court and the forthcoming bond made by them is shown only to be to answer the outcome of the decree in the original cause herein.

Fourteenth. Because there was no property in custodia legis, so far as this court is concerned, at the time of the filing of the first paper in this cause by the complainants in the amended cross-bill, and Latham & Company, its possessors, were then without the jurisdiction of this court, the forthcoming bond by them is only to answer the outcome of the decree in the original cause herein and runs only to the parties named in such bond or indicated therein, who are not cross-complainants, and said amended cross-bill was filed too late.

Fifteenth. Because there was no property in custodia legis, so far as this court is concerned, at the time of the filing of the first paper in this cause by the complainants in the amended cross-bill, and Latham & Company, its possessors, were then without the jurisdiction of this court, the forthcoming bond by them is only to answer the outcome of the decree in the original cause herein and runs only to the parties named in such bond or indicated therein who are not cross-complainants, and it is uncertain whether original complainants or any of them will succeed in the original suit as to which said bond alone relates, and in the event of failure the whole proceeding, so far as the cross-complainants are concerned, will have been a vain thing.

Sixteenth. Because the invitation extended by the original complainants, or some of them, in their bill as amended was by
147 the terms of the invitation "to answer this bill" thereby limiting the invitation's scope, and the amended cross-bill is a mere pretext to take advantage of this limited invitation and extend it beyond its scope.

Seventeenth. Because the sole purpose of the invitation of the original complainants or some of them, by the amendment adding paragraph 4½ to the bill was to effectually avoid a preference and by its nature was limited to only those who might claim rights under such alleged preference or in some way interfere with the avoidance of such preference by claiming any rights thereunder.

Eighteenth. Because before the amended cross-bill was filed, or any paper by the cross-complainants, and after the invitation by the original complainants, or some of them to answer their bill, the cotton was removed and in its place there was substituted a bond running only to the then complainants, or their successors, which of necessity operated as an amendment of the proceedings so far as to make that clause meaningless and reduce the litigation to only those who should be interested under said bond, and this bond by its very terms had no relation to these cross-complainants.

Nineteenth. Because the amended cross-bill is in a double aspect, viz: to enforce a trust in specific property or to charge the estate generally, and in the last aspect has no equity.

Twentieth. Because the cross-bill is of double aspect in that it seeks recovery whether it can trace or cannot trace funds into the cotton, and in the latter aspect is bad.

Twenty-first. Because the amended cross-bill seeks indemnity from the general estate of the bankrupt.

Twenty-second. Because it is uncertain and one cannot tell whether the amended cross-bill seeks to establish a claim upon the specific cotton involved in the original suit or to be indemnified from the general estate of the bankrupt.

Twenty-third. Because it is repugnant in that it claims to disaffirm the use of its funds and to affirm same by tracing funds into the cotton involved in the original suit.

Twenty-fourth. Because it sets up matter irrelevant to the original cause.

148 Twenty-fifth. Because respondents to the original bill, Latham & Company, never gave their consent to the amendment to the bill inviting others into the litigation, nor consented to the filing of the original or amended cross-bill, or the so called answer of the cross-complainants.

Twenty-sixth. Because said amended cross bill alleges no facts showing that these defendants have in their possession or under their control any cotton in which the said cross-complainants have any right, title or interest whatever, or that the said cross-complainants are entitled to any relief against these cross-defendants but is filed, so far as these defendants are concerned, for a discovery only, and the said cross-complainants therein have waived oath or affirmation by these defendants to their answer.

Twenty-seventh. Because cross complainants declined to ratify the investment of said money in said cotton and having claimed said money with interest, the said complainants are estopped from asserting any right to the cotton in which said money is alleged to have been invested.

Twenty-eighth. Because the said cross-bill shows upon its face that the said cross-complainants have not elected to follow the proceeds of their money into the said cotton and to claim the cotton itself, but assert only a lien upon the said cotton for the re-payment of their money, although they allege no contract, either express or implied, which could confer upon them a lien upon said cotton.

Twenty-ninth. Because it is impossible to ascertain from the allegations of the said cross-bill what, if any, cotton that ever went in the possession of these defendants had been purchased with the cross-complainants' money, and what, if any, of said cotton that went into the possession of these defendants is the subject matter of the complainants' alleged rights.

PERCY, BENNERS & BURR,
RICH & HAMILTON,
*Solicitors for Receivers and Trustee Above Mentioned.*

149 I, J. Gaillard Hamilton, one of the solicitors for cross-defendants, who move to dismiss as hereinabove set out, do hereby certify that the foregoing motion, in my opinion, is well founded in law.

J. GAILLARD HAMILTON,
*Solicitor for C. E. Frost and W. S. Lovell, as Receivers, and W. S. Lovell, as Trustee.*

I, J. G. Hamilton, one of solicitors for receivers and trustee, who move to dismiss as hereinabove set out, being duly sworn do say that neither of said receivers or trustee are residents of the Southern District of Alabama, according to his information and belief, and are not now in Mobile; further that the foregoing motion is not interposed for delay.

J. G. HAMILTON.

Sworn to and subscribed before me this 25th day of October, A. D. 1913, at Mobile, Alabama.

RICHARD JONES, JR.,
*Deputy Clerk.*

Filed October 25th, A. D. 1913.
RICHARD JONES, *Clerk.*

150 *Motion of American Surety Company to Dismiss Cross-bill of Knauth, Nachod & Kuhne.*

In the United States District Court, Sitting at Mobile.

No. 279. In Equity.

FRIEDRICH NACHOD et al., Complainants in Cross-bill,
vs.
EDMOND LATHAM et al.

Comes the American Surety Company of New York, respondent, in said cross bill as last amended and without prejudice to or waiver of its demurrer heretofore filed to said amended cross-bill, moves to dismiss the said amended cross-bill upon the following separate and several grounds, viz:

First. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as can not properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause.

Second. Because it seeks to introduce into this cause matters that are distinct from, independent of, and have no connection with those shown by said amended cross-bill to be otherwise involved herein, and which matters so sought to be introduced herein are such as can not properly be litigated or investigated in this suit but only in a suit or proceeding separate from and independent of this cause; nor are the rights claimed by complainants in the original bill and those claimed by cross-complainants in the cross-bill the same or of the same class or nature, nor is there any privity between them as to such rights.

151 Third. Because it is multifarious and the matters sought to be introduced thereby, if included in the original bill of complaint filed in this cause, would have rendered such original bill subject to demurrer for multifariousness as joining distinct and disconnected matters in one suit.

Fourth. Because William S. Lovell is sought to be made a party respondent to this amended cross-bill as trustee in bankruptcy of Knight, Yancey & Company and it is not shown that at the time of the original cross-bill being filed by permission of court, he was a party to this cause as such trustee, thereby seeking to introduce a new party.

Fifth. Because it does not appear from the amended cross-bill or otherwise but that the complainants therein were not parties to this cause at the time of the filing of their amended cross-bill, nor is it alleged that the consent of any of the then parties to such cause was obtained to such filing or to their coming into it.

Sixth. Because said amended cross-bill fails to allege facts entitling complainants therein to the relief or discovery prayed and seeks to

have respondents thereto disclose sufficient facts to so entitle them, if perchance, such facts there be.

Seventh. Because said amended cross-bill or petition of intervention is a fishing bill.

Eighth. Because the funds alleged in said amended cross-bill to have been fraudulently secured from the complainants therein are not by it certainly or positively identified with or traced into the goods or res relative to which a constructive trust is sought to be established.

Ninth. Because said amended cross-bill fails to specify definitely or positively any property into which it seeks, or may seek, to trace the funds alleged to have been fraudulently secured from the complainants therein.

Tenth. Because there is no equity in said amended cross-bill.

Eleventh. Because the said amended cross-bill is in substance and effect in conflict with and adverse to the rights of the com-
152 plainants and the cause as made in the original suit to the extent of the whole claim set up in said amended cross-bill.

Twelfth. Because said amended cross bill shows that this movant -ever had the possession or control of the res relative to which a trust is sought to be established, nor is it shown that it ever will have it.

Thirteenth. Because it is uncertain whether this court ever could afford effective relief as the res is without its jurisdiction and its present possessors are also shown to be without the jurisdiction of this court and the forthcoming bond made by them is shown only to be to answer the outcome of the decree in the original cause herein.

Fourteenth. Because there was no property in custodia legis, so far as this court is concerned, at the time of the filing of the first paper in this cause by the complainants in the amended cross-bill, and Latham & Company, its possessors, were then without the jurisdiction of this court, the forthcoming bond by them is only to answer the outcome of the decree in the original cause herein and runs only to the parties named in such bond or indicated therein, who are not cross-complainants, and said amended cross-bill was filed too late.

Fifteenth. Because there was no property in custodia legis, so far as this court is concerned, at the time of the filing of the first paper in this cause by the complainants in the amended cross-bill, and Latham & Company, its possessors, were then without the jurisdiction of this court, the forthcoming bond by them is only to answer the outcome of the decree in the original cause herein and runs only to the parties named in such bond or indicated therein who are not cross-complainants, and it is uncertain whether original complainants or any of them will succeed in the original suit as to which said bond alone relates, and in the event of failure the whole proceeding, so far as the cross-complainants are concerned, will have been a vain thing.

Sixteenth. Because the invitation extended by the original complainants, or some of them, in their bill as amended was by
153 the terms of the invitation "to answer this bill" thereby limiting the invitation's scope, and the amended cross-bill is a

mere pretext to take advantage of this limited invitation and extend it beyond its scope.

Seventeenth. Because the sole purpose of the invitation of the original complainants or some of them, by the amendment adding paragraph 4½ to the bill was to effectually avoid a preference and by its nature was limited to only those who might claim rights under such alleged preference or in some way interfere with the avoidance of such preference by claiming any rights thereunder.

Eighteenth. Because before the amended cross-bill was filed, or any paper by the cross-complainants, and after the invitation by the original complainants, or some of them to answer their bill, the cotton was removed and in its place there was substituted a bond running only to the then complainants, or their successors, which of necessity operated as an amendment of the proceedings so far as to make that clause meaningless and reduce the litigation to only those who should be interested under said bond, and this bond by its very terms had no relation to these cross-complainants.

Nineteenth. Because the amended cross-bill is in a double aspect, viz: to enforce a trust in specific property or to charge the estate generally, and in the last aspect has no equity.

Twentieth. Because the cross-bill is of double aspect in that it seeks recovery whether it can trace or cannot trace funds into the cotton, and in the latter aspect is bad.

Twenty-first. Because the amended cross-bill seeks indemnity from the general estate of the bankrupt.

Twenty-second. Because it is uncertain and one cannot tell whether the amended cross-bill seeks to establish a claim upon the specific cotton involved in the original suit or to be indemnified from the general estate of the bankrupt.

Twenty-third. Because it is repugnant in that it claims to disaffirm the use of its funds and to affirm same by tracing funds into the cotton involved in the original suit.

154 Twenty-fourth. Because it sets up matter irrelevant to the original cause.

Twenty-fifth. Because respondents to the original bill, Latham & Company, never gave their consent to the amendment to the bill inviting others into the litigation, nor consented to the filing of the original or amended cross-bill, or the so-called answer of the cross-complainants.

Twenty-sixth. Because said amended cross-bill alleges no facts showing that this defendant has in its possession or under its control any cotton in which the said cross-complainants have any right, title or interest whatever, or that the said cross-complainants are entitled to any relief against these cross-defendants, but is filed, so far as the defendants are concerned, for a discovery only, and the said cross-complainants therein have waived oath or affirmation by these defendants to their answer.

Twenty-seventh. Because cross complainants declined to ratify the investment of said money in said cotton and having claimed said money with interest, the said complainants are estopped from asserting any right to the cotton in which said money is alleged to have been invested.

Twenty-eighth. Because the said cross-bill shows upon its face that the said cross-complainants have not elected to follow the proceeds of their money into the said cotton and to claim the cotton itself, but assert only a lien upon the said cotton for the re-payment of their money, although they allege no contract, either express or implied, which could confer upon them a lien upon said cotton.

Twenty-ninth. Because it is impossible to ascertain from the allegations of the said cross-bill what, if any, cotton that ever went in the possession of this defendant had been purchased with the cross-complainants' money, and what, if any, of said cotton that went into the possession of this defendant is the subject matter of the complainant's alleged rights.

Thirtieth. That this court is without jurisdiction to hear and determine the matters and things in said amended cross-bill as therein pleaded and alleged.

155 Thirty-first. That the cross-complainant has no capacity, power or authority to institute, maintain or prosecute said cross-bill as amended in the form and for the matters and things therein alleged.

Thirty-second. That the cross-complainants have not in and by said amended cross-bill made and stated any such cause of action as does or may entitle them as is thereby sought and prayed for against and from this defendant.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors for American Surety Company.*

I hereby certify that in my opinion the foregoing motion is well founded in point of law.

W. B. SPENCER,
*Solicitor for the American Surety Company for the Purpose of Filing said Motion.*

Before me, Rich'd Jones, Clerk of the United States District Court for the Southern District of Alabama, personally appeared W. B. Spencer, who being by me first duly sworn on oath says that he is attorney for the American Surety Company of New York for the purpose of filing the foregoing motion, and that he makes this oath for and on behalf of the said American Surety Company, and affiant says that the motion is not filed for delay.

W. B. SPENCER.

Subscribed and sworn to before — this 25th day of October, A. D. 1913.

RICHARD JONES,
*Clerk United States District Court, Mobile, Alabama.*

Filed October 25th, A. D. 1913.

RICHARD JONES, *Clerk.*

156 District Court of the United States for Southern District of Alabama.

No. 279. In Equity.

W. S. LOVELL, Trustee, etc., et al.,
versus
LATHAM & COMPANY et al.

(Opinion January 24, 1914.)

Percy, Benners & Burr, of Birmingham, Ala.; Rich & Hamilton, of Mobile, Ala., Solicitors for Trustee in bankruptcy.

Howe, Fenner, Spencer & Cocke, of New Orleans, La., Solicitors for Latham & Company, on motion to dismiss cross-bill.

W. B. Spencer, of New Orleans, La., on motion of American Surety Co. to dismiss cross-bill.

Stevens & Lyons, of Mobile, Ala.; Briesen & Knauth, of New York, N. Y., Solicitors for Knauth, Nachod & Kuhne, Cross-Complainants.

TOULMIN, *Judge:*

This suit is one in which the trustee in bankruptcy, representing all creditors of the bankrupt estate, seeks to recover property, or a fund representing said property, which it is alleged and claimed was preferentially transferred to the defendants, Latham & Co., by the bankrupts, Knight, Yancey & Company, in payment of an indebtedness to said Latham & Company.

The suit seeks to avoid the alleged preferential transfer, and to recover the said fund to be administered by the bankrupt court for the benefit of all creditors of the bankrupts.

157 A preference is voidable by the trustee, and he may recover the property or its value. There is no authority in any other person to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion.

Collier on Bankruptcy (9th Ed.) p. 824, 827; 175 Fed. 335; 5 Am. Bk. Rep. 567.

It is only through the instrumentality of the trustee that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy. Creditors can have no remedy which will reach property fraudulently conveyed, except through the trustee. All such property, by the express words of the Bankrupt Act, vest in the trustee by virtue of the adjudication and of his appointment.

98 U. S. 20; 102 U. S. 647; Collier on Bankruptcy, supra.

If the delivery by the bankrupts of the cotton to Latham & Company was a preference, the trustee only can maintain a suit to avoid

it. He may not assign or transfer to another this right of avoidance. 15 Am. Bk. Rep. 388; Collier on Bankcy. (9th Ed.) 824; 175 Fed. 335.

The issue in this case is whether the bankrupts made a preferential transfer to the defendants, Latham & Company, of certain cotton as claimed and alleged in the complaint. If the plaintiff establishes his said claim he would be entitled to recover the cotton or its value. If he fails to establish said alleged transfer he would not be entitled to recover said cotton or its value. If such failure had any effect on the title to the cotton, it would be to make it good in Latham & Company, they having acquired the same by the said transfer of Knight, Yancey & Company, the bankrupts.

The cross-complainants in this suit are not in fact named
158 as defendants in the bill of complaint, or in the subpœna, and no relief is prayed against them, and no service has been had upon them. They are not parties to the original bill, and cannot rightly file or be parties complainant to a cross-bill thereon. 172 Fed. 504.

It is a rule of equity pleading prevailing in the federal courts that one who is not a party to a suit cannot file or join in a cross-bill, or other pleading to the merits until he becomes a party to the suit by some recognized mode of equity procedure. 172 Fed. 504; 175 Fed. 517; 166 Fed. 347.

The cross-complainants came into the case by invitation, contained in the prayer of the bill to unknown persons who might have or claim to have any right or interest in the subject-matter of the suit. Whereupon, the cross-complainants came into court and asked permission to file a cross bill.

The granting or refusing permission to file a cross-bill is largely in the discretion of the court. 151 Fed. 563, 566. The court, in the exercise of its discretion, granted permission to file the cross-bill, being at the time ignorant of its subject-matter and what its real purpose and allegations were. Subsequently, on motion of complainant and the defendants, Latham & Company, to strike out said cross-bill, after argument thereon and examination of the cross-bill, the court was of opinion that it had improvidently granted permission to file it, and sustained the motion to strike. On appeal, the Circuit Court of Appeals held that this court erred in summarily striking out the cross bill and reversed the case for further proceedings.

It now comes up on demurrers to the cross-bill and on motion to dismiss it for want of equity and on various other grounds set out in the demurrers and motion.

A cause of action is a matter for which an action may be brought. It is the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable. The
159 cause of action in this case is the alleged preferential transfer of certain cotton by Knight, Yancey & Company, bankrupts, to Latham & Company. On that cause of action the trustee in bank-

ruptcy has the authority to maintain the required action to avoid the preference, to set aside the transfer and to recover the cotton or its value. This court is, by the original suit, called upon by the trustee to ascertain and establish his right or title to certain cotton as against adverse claimants, Latham & Company, who are made defendants to the suit, and not to any and all persons who may voluntarily come into the case and assert a claim to said cotton. The cross-complainants come into this case by a cross bill and seek to impress a trust in their favor upon various properties and certain cotton in the hands of the trustee in bankruptcy. Any such claim is not germane or pertinent to the original cause of action in the case, and cannot exert any influence in the trial and determination of the issue in it. If the issue made by the original bill can be completely disposed of without deciding upon any claim the cross complainants may have or be supposed to have against Latham & Company, defendants to the original bill, or upon the cotton transferred to said Latham & Company by the bankrupts, as alleged, then the cross-bill filed in this cause is not auxiliary or dependent upon the original suit.

154 Fed. 1003.

The cross-bill prays that the bankrupts be adjudged and decreed to have received the sum of $98,000.00 from the cross-complainants, and to have held the same as their money and property. But the able counsel for cross-complainants, in his brief and argument as I understood it, stated that they presented no personal demand against the bankrupts.

The cross-bill has no prayer for relief against the trustee, the complainant in this suit, further than to seek a discovery from him as to many matters which, in my opinion, are not involved in this suit and have no connection with it, so far as the complainant is concerned. In fact, the counsel stated that the cross-bill is confined to an effort to impress a trust in favor of the cross-complainants upon various and certain property in the hands of the trustee in bankruptcy, but which he admits in his brief was beyond the power of this court in this cause.

The cross-bill also seeks and prays that the transfer by the bankruptcy to Latham & Company, of the cotton mentioned in the bill of complaint, be adjudged "invalid and void and of no effect." It further seeks and prays that the cross complainants be subrogated to any right, title and interest which the trustee may have in any and all cotton, bonds or other property into which their said money may have been converted, and that they be subrogated to any rights which the said trustee may have under said bonds.

I think the law is well settled that if the transfer and delivery by the bankrupts of the cotton in question to Latham & Company was a preferential transfer, as alleged in the original bill, the trustee only can maintain a suit to avoid it. He may not assign or transfer to another this right. Neither, in my opinion, can the cross-complainants be subrogated, that is, substituted for the trustee in the assignment of such rights as claimed.

Collier on Bankcy. (9th Ed.) p. 824; 15 Am. B. Rep. 388; 176 Fed. 335; 98 U. S. 20; 102 U. S. 647, supra.

A cross-bill which sets up matters not pertinent to the original bill and seeks no relief against the original plaintiffs, is without equity.
23 Ala. 219.

A cross-bill is a bill brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit, or against both, touching the matters in question in the original bill.
1 Beach on Modern Equity Practice, Secs. 421, 422; Story's Equity Pleading No. 389.

The matters sought to be brought by the cross-bill into con-
161 troversy between the cross-complainants therein and their co-defendants do not seem to me to be germane to, or to have any connection with the matter in controversy between the complainant in the original bill and the said defendants Latham & Company. "This is a litigation exclusively between the cross-complainants and said Latham & Company, with which the complainant in the original bill should not be embarrassed, or the record encumbered."
The cross-bill should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject matter of an original, independent suit. "A cross-bill is auxiliary to the original suit and a dependency on it."
58 U. S. 591, 594; 154 Fed. 1003.

How are the facts alleged in the cross bill auxiliary to the original suit? How do they give aid or furnish help to that suit, of which the cause of action is an alleged preferential transfer of certain cotton by Knight, Yancey & Co., bankrupts, to defendants Latham & Company?
The cross-complainants are seeking to impress a trust upon certain cotton a part of which they allege their money purchased, and that they have a trust fund in that cotton. The cotton is in the possession of defendants Latham & Company, the title to which they claim under the transfer and delivery to them by Knight, Yancey & Co.
Assuming that the cross-complainants have and can trace a trust fund into the said cotton, how must they proceed to establish their claim and to impress their trust upon said cotton? Manifestly by a suit against said Latham & Company, who have said cotton in their possession and claiming it as their property. Some of the cross-complainants are resident citizens of New York State and some of Germany while Latham & Company are resident citizens of France. How and where does this court acquire jurisdiction to try and determine the controversy between these parties? It certainly ac-
quires no such jurisdiction under the Bankrupt Act; and
162 the general law conferring jurisdiction on the ground of diverse citizenship of the parties to the litigation has no application to the case, in view of the facts shown in it. No juris-

diction of the litigaton between the cross-complainants and the defendants Latham & Company has been acquired by the consent of said defendants.

Collier on Bankcy. (9th Ed.) 482; 17 Am. Bk. Rep. 668; 150 Fed. 279.

On the contentions and admissions of the counsel for the cross complainants, this case, in substance and effect, is a suit by them against Latham & Company of which, in my opinion, this court has no jurisdiction, whether the attitude of the so-called cross-complainants is that of cross complainants, or intervenors as they may be called.

A motion to dismiss a bill for want of equity should be sustained if, admitting the facts apparent on the face of the bill, whether well or ill pleaded, the complainant can have no relief. 75 Ala., 368; 130 Ala. 268; Id. 584.

I am of opinion that the motions to dismiss the cross-bill should be sustained, both for want of equity in said cross-bill, and for want of jurisdiction in this court to entertain the same.

Let a decree be entered accordingly.

Filed Jan'y 24/1914.

RICH'D JONES, *Clerk.*

163 *Decree Dismissing Cross-bill.*

District Court of the United States for the Southern District of Alabama.

No. 279. In Equity.

W. S. LOVELL, Trustee of Knight, Yancey & Company, Bankrupts,
versus
LATHAM & COMPANY et al.

KNAUTH, NACHOD & KUHNE
versus
LATHAM & COMPANY et al.

Bill and Cross-bill, in re Cross-bill of Knauth, Nachod & Kuhne.

This cause coming on to be heard and being argued and submitted on the motions of the Trustee in Bankruptcy, Latham & Company, et al., and American Surety Company to dismiss the cross-bill of Knauth, Nachod & Kuhne for want of equity and for want of jurisdiction in this court to entertain the same, and the same being duly considered by the court, the court is of opinion that said motions should be sustained on both of said grounds: It is therefore ordered, adjudged and decreed by the court that said motions to dismiss said cross-bill as to both of said grounds be and the same are hereby sustained, and that said cross-bill be and the same is

hereby dismissed out of court at the costs of the cross-complainants Knauth, Nachod & Kuhne.

Made this 24th day of January A. D. 1914.

HARRY T. TOULMIN, *Judge.*

Filed and entered January 24, 1914.

RICHARD JONES, *Clerk.*

164 *Assignment of Errors.*

District Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Complainant,
against
LATHAM & COMPANY, Defendants.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM and Others, Defendants.

The complainants in the second above entitled bill of complaint herein, Knauth, Nachod & Kuhne, being about to ask for the allowance of an appeal from the order and decree herein (to the effect that their "said cross-bill be and the same is hereby dismissed out of court at the costs of the cross-complainants, Knauth, Nachod & Kuhne"), made and entered on or about January 24, 1914, do hereby make the following assignment of errors in said decree and in the proceedings of the court:

1. The District Court erred in dismissing the bill of Knauth, Nachod & Kuhne for want of equity, whether said bill be characterized as a cross-bill or as an ancillary or other original bill.

165 The court had seized and sequestered property that was alleged in their bill to belong to them and said allegations were admitted by the motions to dismiss. The Court had thereby prevented them from following said property and invoking the aid of any other tribunal in asserting their right to the same. It had then permitted the original complainants, the receivers and Joe T. Gibson, a creditor of the bankrupts, Knight, Yancey & Company, to make all persons, claiming an interest in said property, parties to the original suit and to cite them to answer their bill. It had then permitted a bond to be substituted in lieu of said property, conditioned that the property would be forthcoming to answer the final decree of the court in the suit. Being thus called upon to do so, Knauth, Nachod & Kuhne appeared and answered the bill of said complainants and were permitted by the court to file their own bill herein. Their bill has now been dismissed although they were able, as was conceded by the motions to dismiss and as the Court assumed, to trace their money into the property in question; and they

have been decreed to pay costs for doing what the Court had permitted the said original complainants to call upon them to do. It is submitted that the said order or decree, dismissing the bill of Knauth, Nachod & Kuhne with costs against them, deprives them of their property contrary to law and contrary to equity and without due process of law and denies to them the equal protection of the laws; and, therefore, that it is in contravention among other things, of Article V and Article XIV of the amendments to the constitution of the United States.

2. The District Court erred in dismissing the bill of Knauth, Nachod & Kuhne, for want of jurisdiction to entertain the same. The original suit was not brought merely against the person of the defendants, to set aside a voidable preference and for the recovery of a money judgment. It was brought to obtain the possession of certain property and, pending a determination thereof, to impound and sequester said property. Property belonging to Knauth, Nachod & Kuhne was seized and sequestered by the court and
166 they were expressly called upon to present to the court any claim they might have thereto. Even if they had not been expressly called upon to do so, they were entitled to ask a court of equity, having possession of their property, to protect and enforce their rights therein. All other tribunals were closed to them when the late Circuit Court took possession of the property and then substituted a forthcoming bond in place of the property. The decree releasing the property, after "all persons, firms or corporations who claim any right, title or interest in and to the said seventy-eight hundred (7800) bales of cotton" had been called on to present the same to the Court, is a bar to a suit to recover the same in any other court. When a court of equity acquires jurisdiction of the res of a controversy, its jurisdiction excludes that of all other tribunals. The Court acquired jurisdiction of the res by sequestration of the property. It acquired jurisdiction of the person of the defendants named in the bill of Knauth, Nachod & Kuhne when they appeared and contested said bill on the merits or on the jurisdiction of the Court over the subject matter thereof. The jurisdiction was complete both in rem and in personam.

3. The District Court erred in treating the bill of Knauth, Nachod & Kuhne as a distinctively and exclusively pure cross-bill. They filed their bill expressly as "their amended cross-bill of complaint (or their petition or bill of complaint in intervention, if the court hold that it should be so denominated)". It is clearly of an original and ancillary character, as well as of the nature of a cross-bill. Process thereon was prayed for and issued and served, on some defendants within the district and on the rest without the district as provided by a decree of the court. The defendants have appeared generally, by moving to dismiss it for want of jurisdiction and on the merits.

4. The District Court erred in holding that Knauth, Nachod & Kuhne are not parties to the original suit and that no relief was sought against them and that they could not rightly file
167 their own bill herein. That they are parties and entitled to present whatever claim they may have to the property in

question has been determined herein, as they submit, by the United States Circuit Court of Appeals, Fifth Circuit. (Knauth, Nachod & Kuhne vs. Lovell et al., 200 Fed. Rep. 403.) The relief sought against them was, in effect, that they submit any right, title and interest claimed by them in the cotton in question to the determination of the Court.

5. The District Court erred in holding that the bill of Knauth, Nachod & Kuhne is not germane or pertinent and cannot be considered a proceeding necessary to a complete determination of the litigation in the original bill. The matter in litigation in the original bill is the property, a part of which was seized and sequestered by the court, and the right, title and interest therein of all persons. Obviously the Court can not pass finally on the rights of all parties in said property without hearing and determining the rights of Knauth, Nachod & Kuhne. Any other determination will not be final and the court should not pass on the rights of any party until all parties and their rights are before it for adjudication.

6. The District Court erred in holding that the bill of Knauth, Nachod & Kuhne is not auxiliary to or a dependency on this suit and not connected with the original bill. The bill of Knauth, Nachod & Kuhne was filed for the purpose of establishing a right, title and interest in property in the possession or under the dominion and otherwise subject to the jurisdiction of the court in this suit. It is submitted that such bill is auxil*l*ary and anci*l*iary to the suit in which the court assumed jurisdiction and *taken* possession, actually or potentially, of the res of the controversy.

7. The District Court erred in holding that the property in question is in the possession of Latham & Company. The property, or a part thereof, was sequestered by the Court and the Court then substituted a forthcoming bond for the property. The bond
168 stands in lieu of the property and, in contemplation of law, the property is in the possession of the Court. The complainants, Knauth, Nachod & Kuhne, have the same right to follow their money into the bond that they had to follow it into the property. In equity the bond represents the property the same as the avails would represent it, if the Court had caused it to be sold and the avails deposited in Court, except that Latham & Company have the option to produce the cotton itself instead of its equivalent in money. Said option emphasizes the exclusiveness of the jurisdiction of the Court.

8. The District Court erred in holding that the complainants, Knauth, Nachod & Kuhne, must proceed, in some other suit, against Latham & Company, in some other jurisdiction, to establish their claim against the property for which the Court has substituted the forthcoming bond of said Latham & Company in this suit.

9. The District Court erred in holding that this is a litigation exclusively between the complainants, Knauth, Nachod & Kuhne, and the defendants Latham & Company, with which the complainant in the original bill should not be embarrassed or the record encumbered. The original complainants and also the Trustee of the bankrupts dispute the rights of Knauth, Nachod & Kuhne; and the original

complainants called upon them to present their claim to the property in question.

10. The District Court erred in holding that the original suit was brought by the Trustee of the bankrupts, Knight Yancey & Company. It was brought by the Receivers and Joe T. Gibson, an unsecured creditor of said bankrupts, suing "for himself and all other creditors who may become or make themselves parties to this proceeding." It was sustained solely in the right of a creditor to maintain it. (Frost et al. vs. Latham & Co. et al., 181 Fed. Rep. 866.) The right of Knauth, Nachod & Kuhn to make themselves parties to the proceeding and maintain their own bill is greater than
169 that of an unsecured creditor. The Trustee of said bankrupts was substituted for the original complainants after Knauth, Nachod & Kuhne had filed their bill, as they had been called upon to do.

11. The District Court erred in holding that the bill of Knauth, Nachod & Kuhne seeks no relief against the Trustee of Knight, Yancey & Company, except a discovery of matters not involved in the suit. The prayer is, among other things, that the bankrupts be adjudged to have received the money of Knauth, Nachod & Kuhne and to have held the same in trust for their benefit and that both the bankrupts and their Trustee account for said money and for any property acquired or claimed by the Trustee, into which it can be traced, including the forthcoming bond which the Court had substituted for the property in question; and that said bond be impressed with a trust or charge and that said trust be enforced by a decree for payment.

12. The District Court erred in holding that only the Trustee in Bankruptcy of Knight, Yancey & Company could maintain a suit to set aside a voidable preference by said bankrupts to Latham & Company. Either said Trustee or Knauth, Nachod & Kuhne or an unsecured creditor or one acquiring the rights of the Trustee can maintain such a suit. In fact the original suit herein was sustained in the right of Joe T. Gibson, an unsecured creditor.

13. The District Court erred in ignoring the fact that the bill of Knauth, Nachod & Kuhne sets forth also that the transfer of the property in question, by the bankrupts to Latham & Company, was void because made for the purpose of hindering, delaying and defrauding creditors and the rightful owners thereof, including Knauth, Nachod & Kuhne. Said allegations are admitted by the motions to dismiss. Certainly Knauth, Nachod & Kuhne as well as the original complainant, Joe T. Gibson, an unsecured cred-
170 itor, in whose right the original suit was sustained, have the right to maintain a suit to set aside such a transfer.

14. The District Court erred in holding the law against Knauth, Nachod & Kuhne. It is submitted that the decree of the court dismissing the bill of Knauth, Nachod & Kuhne is contrary to the admitted facts in the cause, contrary to law and contrary to equity.

Wherefore the defendants and ancillary, cross or other complaints, Knauth, Nachod & Kuhne, pray that the said decree of the District

Court against them (entered on or about January 24, 1914, dismissing their bill) be reversed.

STEVENS, McCORVEY & DEAN,
*Solicitors for Knauth, Nachod & Kuhne,*
*Mobile, Alabama.*

BRIESEN & KNAUTH,
*Counsel for Knauth, Nachod & Kuhne,*
*25 Broad Street, New York, N. Y.*

T. M. STEVENS, *of Solicitors and Counsel.*

Filed March 28, 1914.
RICHARD JONES, *Clerk.*

171 *Petition for Appeal.*

District Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Complainants,
against
LATHAM & COMPANY, Respondents.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM, CHARLES LATHAM, RAOUL LATHAM, AMERICAN Surety Company, Clarence E. Frost, and William S. Lovell, as Receivers in Bankruptcy of Knight, Yancey & Company; William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, and Others, Defendants.

The complainants in the last above entitled bill of complaint, Knauth, Nachod & Kuhne, conceive themselves aggrieved by the order and decree made and entered on the 24th day of January, 1914, in the above entitled cause, and do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit. The grounds upon which this appeal is based are specified in the assignment of errors which is to be presented
172 and filed herewith. They pray that this appeal be allowed and that a transcript of the record, proceedings and papers upon which said order or decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Fifth Circuit.

STEVENS, McCORVEY & DEAN,
*Solicitors for Knauth, Nachod & Kuhne,*
*Mobile, Alabama.*

BRIESEN & KNAUTH,
*Counsel for Knauth, Nachod & Kuhne,*
*25 Broad Street, New York, N. Y.*

T. M. STEVENS, *of Solicitors and Counsel.*

173 *Order Allowing Appeal.*

District Court of the United States for the Southern District of Alabama.

In Equity. No. 279.

W. S. LOVELL, Trustee of Knight, Yancey & Company, Bankrupts,
versus
LATHAM & COMPANY et al.

KNAUTH, NACHOD & KUHNE
versus
LATHAM & COMPANY et al.

Bill and Cross-bill.

This cause coming on to be heard on the petition of Knauth, Nachod & Kuhne, cross-complainants, praying an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree entered herein dismissing the cross-bill on January 24th, 1914, and said cross-complainants now filing assignment of errors as required by rules of court: It is ordered by the court that said appeal be and the same is hereby allowed. It is further ordered that the bond for costs and charges to be given by said cross-complainants on said appeal be and the same is hereby fixed at Five Hundred Dollars ($500.00).

Made March 28th, 1914.

HARRY T. TOULMIN, *Judge.*

Filed and entered March 28, 1914.

RICH'D JONES, *Clerk.*

174 *Appeal Bond.*

District Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

KNAUTH, NACHOD & KUHNE, Appellants,
against
LATHAM & COMPANY and Others, Appellees.

Know all men by these presents:

That we, Knauth, Nachod & Kuhne, as principals and the National Surety Company, as surety, are held and firmly bound unto Edmond Latham, Charles Latham and Raoul Latham, composing the firm of Latham & Company; American Surety Company of New York, Clarence E. Frost and William S. Lovell, as Receivers in Bankruptcy of Knight, Yancey & Company; and William S. Lovell,

as Trustee in Bankruptcy of Knight, Yancey & Company in the full and just sum of Five Hundred — ($500.00) to be paid to the said obligees, their certain attorneys, executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the 21st day of March, 1914.

Whereas, the District Court of the United States for the Southern District of Alabama, in a suit pending in said Court as above entitled, has lately rendered an order and decree against said
175 Knauth, Nachod & Kuhne; and said Knauth, Nachod & Kuhne are about to apply for the allowance of an appeal from said order and decree and for, a citation to said obligees, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be held at the City of New Orleans, Louisiana, in said Circuit, for the purpose of having said order and decree reversed, and to file such appeal, when allowed, in the clerk's office of said court.

Now, therefore, the condition of this *application* is such that if the said Knauth, Nachod & Kuhne shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation shall be void, otherwise it shall remain in full force and virtue.

KNAUTH, NACHOD & KUHNE, [L. S.]
[L. S.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
*Resident Vice President.*

Attest:
E. M. McCARTHY,
*Resident Ass't Secretary.*

*Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
*County of New York, ss:*

On this 21st day of March one thousand nine hundred and fourteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Knauth, Nachod & Kuhne as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that
176 he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the state of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Knauth, Nachod & Kuhne is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of

said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2,000,000) dollars.

That Alex. McKinstry, Mobile, Alabama is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 21st day of March, 1914.

[L. S.]

H. E. EMMETT,
*Notary Public, Kings County, No. 4.*

Certificate filed in New York County, No. 2.

STATE OF NEW YORK,
*County of New York, ss:*

On this 21st day of March, 1914, before me personally came Wilhelm Knauth, to me known and known to me to be a member of the firm of Knauth, Nachod & Kühne, one of the parties described in and which executed the foregoing instrument, and he per-
177 sonally acknowledged to me the execution thereof as the act and deed of his said firm, Knauth, Nachod & Kühne.

[L. S.]

JOSEPH TISCHLER,
*Notary Public, New York County:*

The foregoing bond is hereby approved, both as to form and manner of execution and as to the sufficiency of the surety therein.

Dated this 28th day of March, 1914.

HARRY T. TOULMIN,
*United States District Judge.*

Filed March 28, 1914.
RICHARD JONES, *Clerk.*

*Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company; Clarence E. Frost and William S. Lovell, as Receivers in Bankruptcy of Knight, Yancey & Company; Latham & Company, a partnership composed of Edmond Latham, Charles Latham, and Raoul Latham; American Surety Company of New York, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, within thirty (30) days from the date hereof, pursuant to an appeal allowed by the District Court of the United States for the Southern District of Alabama, in Equity Cause No. 279 wherein W. S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company et al. are complainants, and Latham & Company et al. are defendants, and wherein Knauth, Nachod & Kuhne are cross-complainants and Latham & Company et al. are cross-defendants, and wherein Knauth, Nachod & Kuhne are appellants and you the said William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company; Clarence
178 E. Frost and William S. Lovell as Receivers in Bankruptcy of Knight, Yancey & Company; Latham & Company a partnership composed of Edmond Latham, Charles Latham, and Raoul Latham; and American Surety Company of New York, are appellees, to show cause, if any there be, why the judgment and decree rendered by said District Court in your favor on January 24th, 1904, as mentioned in said appeal, should not be corrected and full and speedy justice done to the parties in that behalf.

Witness Honorable Harry T. Toulmin, Judge of the District Court of the United States for the Southern District of Alabama, and the seal of said court, at Mobile, Alabama, this 28th day of March 1914.

[SEAL.] HARRY T. TOULMIN,
*U. S. Judge, Southern District of Ala.*

Attest:
RICH'D JONES,
*Clerk U. S. District Court,*
*Southern District of Ala.*

We hereby accept service of the foregoing citation and acknowlerge receipt of a copy thereof this 31st day of March 1914.

JOS. C. RICH,
J. GAILLARD HAMILTON,
*Solicitors and of Counsel for William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, and Clarence E. Frost and William S. Lovell, Receivers in Bankruptcy of Knight, Yancey & Company.*

We accept service of the foregoing citation and acknowledge receipt of a copy thereof this 2d day of April A. D. 1914.

HOWE, FENNER, SPENCER & COCKE,
*Solicitors and of Counsel for Latham & Company, a Partnership Composed of Edmond Latham, Charles Latham, Raoul Latham, and American Surety Company.*

Filed April 3rd, 1914.
RICH'D JONES, *Clerk.*

179 *Order of Enlargement.*

District Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Complainant,
against
LATHAM & COMPANY, Defendants.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM and Others, Defendants.

This cause came on to be heard at this time on the petition attached and was submitted by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the time for the printing, certification and filing of the transcript of the record upon the appeal herein, allowed March 28, 1914, be and the same hereby is extended for the period of thirty days from the 27th day of April, 1914.

Dated April 27, 1914.

DAVID D. SHELBY,
*United States Circuit Judge.*

180 *Petition for Enlargement.*

District Court of the United States, Southern District of Alabama, Southern Division.

In Equity. No. 279.

WILLIAM S. LOVELL, as Trustee in Bankruptcy of Knight, Yancey & Company, Complainant,
against
LATHAM & COMPANY, Defendants.

FRIEDRICH NACHOD and Others, Complainants,
against
EDMOND LATHAM and Others, Defendants.

STATE OF NEW YORK,
*County of New York, ss:*

I, George T. Hogg, being duly sworn, say:

I am one of counsel (with Briesen & Knauth, New York, N. Y.) for the appellants, Knauth, Nachod & Kuhne, on the appeal herein, allowed March 28, 1914. On April 13, 1914, I served a præcipe, pursuant to Rules 75-76 of the present Equity Rules, on Messrs. Rich & Hamilton, solicitors for appellees Receivers and for Appellee Trustee, Mobile, Alabama, and on Messrs. Howe, Fenner, Spencer & Cocke, solicitors for appellees Latham & Company and American Surety Company of New York, New Orleans, La., through the Post Office, by depositing a copy thereof in the mail for each of said firms respectively, each copy being properly inclosed in a sealed and post-paid envelope directed to each of said firms at its said address
181 respectively. Neither copy of said præcipe has been returned and I am informed thereby and believe that both were delivered to said firms respectively. I also inclosed to said Howe, Fenner, Spencer & Cocke the original præcipe and a request for an admission of service and that said original be forwarded to said Rich & Hamilton to sign the admission of service. Request was also made that said Rich & Hamilton sign the admission of service, when received from said Howe, Fenner, Spencer & Cocke and send it to the Clerk of the United States District Court, Mobile, Alabama. Said Briesen & Knauth duly received the following letter in answer to said request:

"NEW ORLEANS, April 15, 1914.

Messrs. Briesen & Knauth, 25 Broad Street, New York City.

GENTLEMEN: * * * Our Mr. Spencer, who has had exclusive charge of this matter, is at present absent from the City. We expect him to be back within the next four or five days and we venture to hope that you will allow us to postpone action on this matter until his return.

Yours very truly,

HOWE, FENNER, SPENCER & COCKE."

The appellants have not heard from said solicitors since the receipt of said letter and are ready to print the record and to have it in type in a few days after they learn the pleasure of the appellees. The thirty days' time from the allowance of the appeal, if that be the period under the present practice, is about to expire and the appellants ask for an order extending the time for printing and filing the transcript of record on appeal.

GEO. T. HOGG.

Sworn to before me this 25th day of April, 1914.
[L. S.] FRITZ ZIEGLER, JR.,
*Notary Public, Richmond County.*

Certificate filed in New York County.

182 *Certificate.*

UNITED STATES DISTRICT COURT,
*Southern District of Alabama, ss:*

I, Richard Jones, clerk of said court, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings in this court in equity in the cause therein set forth which record remains on file in my office as such clerk in said cause, and that the same constitutes the record and proceedings under the foregoing citation on appeal.

In testimony whereof, I have hereto set my hand and affixed the seal of said court, at the city of Mobile, Alabama, this the 21st day of May, 1914.

[SEAL.] RICHARD JONES, *Clerk.*

183 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

*Argument and Submission.*

Extract from the Minutes of January 6, 1915.

No. 2651.

KNAUTH, NACHOD & KUHNE
versus
LATHAM & COMPANY et als.

On this day this cause was called, and, after argument by T. M. Stevens, Esq., and George T. Hogg, Esq., for appellants, and Charles Payne Fenner, Esq., and Augustus Benners, Esq., for appellees, was submitted to the Court.

*Opinion of the Court.*

Filed January 18, 1915.

184 United States Circuit Court of Appeals, Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
vs.
LATHAM & COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Alabama.

Knight, Yancey & Company, large dealers in spot cotton in Decatur, Alabama, having become seriously embarrassed, involuntary bankruptcy proceedings were filed against them in the Northern District of Alabama, and William S. Lovell and Clarence E. Frost were appointed temporary Receivers. Alleging that Latham & Company, a cotton firm, domiciled and doing business in Havre, France, had, by delivery to them of a large amount of cotton, received
185 an unfair preference from Knight, Yancey & Company, Frost and Lovell filed their bill in the Southern District of Alabama, against that firm to recover about forty-two hundred (4200) bales of cotton then in process of shipment by Knight, Yancey & Company to Latham & Company, and at that time located on a steamship wharf in the City of Mobile. The Receiver's bill was subsequently amended by adding an allegation, or information and belief, that there were other persons than Latham & Company who claimed some right, title and interest in the cotton in question, and praying that all persons, firms or corporations who claimed any right, title or interest in and to said forty-two hundred (4200) bales of cotton be made party defendants to the bill and be cited by publication to answer the bill.

After obtaining the leave of court to that effect, the appel-
186 lants, presumably in pursuance of the invitation so extended, filed an answer and also what they denominated a cross-bill or bill of intervention. To this bill Latham & Company and the American Surety Company filed demurrers, and William S. Lovell, who had been granted leave to prosecute the suit as trustee, filed a motion to strike from the files. Before hearing was had on these matters, the appellants filed an amended cross-bill and thereafter the matter coming on to be heard on a motion of William S. Lovell, Trustee to strike said amended cross-bill from the files, the District Court so ordered. Thereafter an appeal was taken by Knauth, Nachod & Kuhne to this court, and it was here held that the procedure adopted to secure the dismissal of the cross bill was not the proper procedure. See opinion on former appeal, 200 Federal Reporter, 403.
187 The opinion of the trial court will be found reported in 211 Fed. Rep. 374, to which reference is made for more complete statement.

Stevens, McCorvey & Dean, and Briesen & Knauth and George T. Hogg, for the Appellants.

Walker B. Spencer, Charles Payne Fenner, Philip S. Gidiere, and Esmond Phelps for Latham & Company and American Surety Company.

Percy, Benners & Burr and Rich & Hamilton for the Trustee in Bankruptcy.

Before Pardee, Circuit Judge; Maxey and Foster, District Judges.

*Memorandum Opinion of the Court by Maxey, District Judge.*

The bill filed by the trustee in bankruptcy was merely to set aside an alleged preferential transfer of cotton made by the bankrupts, Knight, Yancey & Company, to Latham & Company. The
188 suit was instituted in the Southern District of Alabama and the original bankruptcy proceeding to have Knight, Yancey & Company adjusted bankrupts was brought, and is now pending, in the Northern District of that state. The adjudication of bankruptcy in the latter court brought the property of the bankrupts wherever situated into custodia legis and that court thus acquired the full right to administer the estate. Thus it was said by the Supreme Court in Lazarus v. Prentice, 234 U. S. at page 266:

"The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts wherever situated into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Mueller v. Nugent, 184 U. S. 1; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300."

189 Hence the appellants had no place in the suit instituted by the trustee merely to set aside a preferential transfer. If as

claimed they may impress a trust in their favor upon any of the assets of the bankrupts in the hands of the trustee no reason is perceived why they may not proceed in the court of original jurisdiction. In any event they will not be permitted to intervene in an ancillary suit, brought by the trustee, the sole purpose of which is to collect assets of the bankrupt and transfer them to the proper court for administration.

Upon the hearing of the motion the trial court dismissed, without qualification, the cross-bill or petition of intervention filed by the appellants.

The order of dismissal should be so amended as to show that the bill or petition is dismissed without prejudice, and as thus
190 amended it is affirmed.

*Judgment.*

Extract from the Minutes of January 18, 1915.

No. 2651.

KNAUTH, NACHOD & KUHNE
versus
LATHAM & COMPANY et als.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the order of dismissal of the said District Court in this cause be, and the same is hereby so amended as to show that the bill or petition is dismissed without prejudice, and, as so amended, the said order of dismissal be, and the same
191 is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Knauth, Nachod & Kuhne, and the surety on the appeal bond herein, National Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

192 *Petition for Rehearing.*

Filed February 8, 1915.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
against
LATHAM & COMPANY and Others, Appellees.

To the above Court:

The petition of the appellants, Knauth, Nachod & Kuhne, respectfully shows that the appellants feel aggrieved by the decision of the appeal herein and are advised that this is a case in which they may with propriety request a re-hearing, to the end that the Court may consider the grounds on which the request is made and, if it agree that a re-hearing is proper, grant the same. The grounds, on which a re-hearing is requested, are as follows:

1. The proposition that Knauth, Nachod & Kuhne were deprived of the right to follow their money into the cotton in question in the Southern District of Alabama, because of the bankruptcy proceedings in the Northern District of Alabama, is not sustained by the case cited in the Court's memorandum of opinion and is contrary to law.

Said right existed prior to bankruptcy proceedings and the
193 law preserved it and the Trustee in Bankruptcy took subject thereto.

2. The cotton in question is not a part of the bankrupt estate. It was transferred by the bankrupts to Latham & Company. The Trustee will be entitled to it only in case he succeed in setting aside the transfer on the ground that it was a voidable preference as the same is defined by the Bankruptcy Act. The bill of the appellants should not be dismissed until it be determined that the Trustee is to recover the cotton in question, even on the theory set forth in the Court's memorandum of opinion. Until then the property will not be in custodia legis of the Bankruptcy Court and that Court will have no jurisdiction over it.

3. The suit of the Trustee is not merely to set aside a preferential transfer. It is also a suit to impound and sequester the property in question, until said transfer can be set aside, and then to recover the possession thereof. The court below impounded and sequestered the property in question and that carried with it the jurisdiction and duty to hear and determine the rights of the appellants therein.

4. The court below duly granted a decree permitting the appellants to file their bill. No application to vacate said decree was made and it remains in force. Quite apart from the fact that the appellants had been made parties and called upon to answer, as unknown claimants of the property impounded and sequestered, said permission to file their bill admitted them to the suit and entitled them to have their claim heard and determined upon its merits.

5. Latham & Company are not purchasers in good faith or for value and the appellants have the same right to follow the property in question into the Southern District of Alabama and impress a trust or charge upon it, as the proceeds of their money, as if it remained in the hands of the bankrupts in the Northern District of Alabama.

194 Wherefore the appellants submit, with great deference, that the Court has misapprehended the facts of the case and the law applicable to the same; and they respectfully pray that a rehearing of the appeal herein be granted.

Dated February 1, 1915.

GEORGE T. HOGG,
*Of Counsel for Appellants.*

STEVENS, McCORVEY & McLEOD,
*Solicitors and Counsel for Appellants.*

503 City Bank Building, Mobile, Alabama.

BRIESEN & KNAUTH,
*Counsel for Appellants.*

25 Broad Street, New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
*Of Counsel.*

*Certificate of Counsel.*

I, George T. Hogg, of counsel for the appellants herein, do hereby certify that, in my judgment, the foregoing petition for a re-hearing herein is well founded; and that the same is made in good faith and not for the purpose of delay.

GEORGE T. HOGG.

195 *Order Denying Rehearing.*

Extract from the Minutes of February 22, 1915.

No. 2651.

KNAUTH, NACHOD & KUHNE
versus
LATHAM & COMPANY et al.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

*Assignment of Errors.*

Filed March 1, 1915.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
against
LATHAM & COMPANY and Others, Appellees.

The appellants, Knauth, Nachod & Kuhne, (being about to
196 ask for the allowance of an appeal to the Supreme Court of the United States from the order of this court, made and entered herein on or about January 18, 1915, so far as the same affirms the order or decree of the court below) hereby make the following assignment of errors in the said order and in the proceedings of the court:

1. The above Circuit Court of Appeals erred in merely amending and then affirming as amended the order or decree of the United States District court for the Southern District of Alabama. Said order or decree should have been reversed.

2. The above Circuit Court of Appeals erred in proceeding upon the theory that the original suit in said District Court (by the receivers and a creditor of the bankrupts, Knight, Yancey & Company) was merely to set aside a preferential transfer; and
197 upon the theory that the property in question was in custodia legis of the bankruptcy court in the Northern District of Alabama; and upon the theory that the case of Lazarus vs. Prentice (234 U. S. 263) is an authority applicable to this case; and upon the theory that the appellants had no place in said original suit; and upon the theory that the appellants had no right to intervene and file their cross-bill (or whatever it should be denominated) in said original suit.

3. The United States District Court for the Southern District of Alabama erred in dismissing the bill of the appellants, Knauth,

Nachod & Khune, either for want of equity or for want of jurisdiction, whether said bill be characterized as a cross-bill or as an
198 ancillary or other original bill. The appellants hereby refer to and make a part hereof their assignment of errors in said District Court, with the same force and effect as if the same were herein fully and at length set forth.

Wherefore the appellants, Knauth, Nachod & Kuhne, pray that the said order of the above Circuit Court of Appeals (made and entered herein on or about January 18, 1915) be reversed, so far as the same affirms the order or decree of the United States District Court for the Southern District of Alabama dismissing the appellants' cross-bill (or whatever it should be denominated). They also pray that the said order or decree of said District Court be reversed.

(Signed) GEORGE T. HOGG,
*Of Counsel for Appellants.*

STEVENS, McCORVEY & McLEOD,
*Solicitors and Counsel for Appellants.*

503 City Bank Building, Mobile, Alabama.

199 BRIESEN & KNAUTH,
*Counsel for Appellants.*

25 Broad Street, New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
*Of Counsel.*

*Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 183 to 199 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2651, wherein Knauth, Nachod & Kuhne are ap-
200 pellants, and Latham & Company, and others, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 182 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City

of New Orleans, Louisiana, in the Fifth Circuit, this 4th day of March, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

201 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
vs.
LATHAM & COMPANY et als., Appellees.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 6th day of May, A. D. 1915, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"United States Circuit Court of Appeals, Fifth Circuit.

No. 2651.

KNAUTH, NACHOD & KUHNE, Appellants,
against
LATHAM & COMPANY and Others, Appellees.

It is hereby stipulated that the transcript of the record of the above entitled cause in this Court which was filed in the office of the Clerk of the Supreme Court of the United States, with the petition for the writ of certiorari which has been issued to this
202 Court herein, shall be taken as a return to said writ; and that the Clerk of the above Court may return said writ with a duly authenticated copy of this stipulation attached instead of another transcript of said record.

Dated April 30, 1915.

(Signed) GEORGE T. HOGG,
*Of Counsel for Appellants.*

(Signed) AUG. BENNERS,
*Of Counsel for Appellees Receivers and Trustee.*

(Signed) HOWE, FENNER, SPENCER & COCKE,
*Of Counsel for Appellees Latham & Company and American Surety Company of New York."*

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 6th day of May, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.*

203 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Knauth, Nachod & Kuhne are appellants, and Latham & Company et al. are appellees, No. 2651, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of Alabama, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
204 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

205 [Endorsed:] File No. 24,652. Supreme Court of the United States, October Term, 1914. No. 908. Knauth, Nachod & Kuhne vs. Latham & Company et al. Writ of Certiorari. U. S. Circuit Court of Appeals. Filed May 4, 1915. Frank H. Mortimer, Clerk.

206 [Endorsed:] File No. 24,652. Supreme Court U. S., October term, 1915. Term No. 420. Knauth, Nachod & Kuhne vs. Latham & Company et al. Writ of certiorari and return. Filed May 10, 1915.

# (24,939)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1915.**

# No. 656.

MAX JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, APPELLANTS,

*vs.*

WILLIAM S. LOVELL, AS CUSTODIAN, &c., AND AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1915.

**Amended Bill.**

# District Court of the United States,

## NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE,

Complainants,

AGAINST

WILLIAM S. LOVELL, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & COMPANY; EDMOND LATHAM; CHARLES W. LATHAM; RAOUL LATHAM; AMERICAN NATIONAL BANK of Pensacola; FIRST NATIONAL BANK of Pensacola; LOUISVILLE & NASHVILLE RAILROAD COMPANY; and AMERICAN SURETY COMPANY OF NEW YORK,

Defendants.

In Equity.

The complainants above named, Knauth, Nachod & Kuhne, make this their amended bill of complaint (or

whatever it should be denominated) against the defend-
4 ants above named and allege, on information and belief:

FIRST—NAME, ETC. OF PARTIES.

1. The complainants are copartners in business, doing business as international bankers and maintaining a banking house at New York, N. Y., and at Leipzig, Germany, under the firm name and style of Knauth, Nachod & Kuhne. Said Friedrich Nachod, Max Jaffe and August Stern are citizens or subjects of Germany and reside at Leipzig, Germany. Said Wilhelm Knauth is a citizen or subject of Germany and resides at Arrochar, County of Richmond, City and State of New
5 York. Said Arend H. Weingardt is a citizen or subject of Germany and resides at Montclair, Essex County, New Jersey. Said Oscar L. Gubelman is a citizen of the State of New Jersey and resides at West Orange, Essex County, New Jersey. Said Rollin C. Newton is a citizen of the State of New York and resides at Scarsdale, Westchester County, New York. Said Mary W. Knauth and Percival Kuhne are citizens of the State of New York and reside in the County, City and State of New York.

2. The defendant William S. Lovell as the Custodian of certain property impounded by the above named
6 Court and as Trustee in Bankruptcy of Knight, Yancey & Company, is a citizen of the State of Alabama and resides at Birmingham, Jefferson County, Alabama, and was appointed as said Custodian by this Court and was appointed as said Trustee by the United States District Court for the Northern District of Alabama, Northeastern Division. The bankrupts, Knight, Yancey & Company, were a co-partnership firm and had their General Office at Decatur, Morgan County, Alabama, where the active partner, John W. Knight, resided and managed the business of the firm. The defendants Edmond Latham, Charles W. Latham and Raoul Latham are

co-partners in business doing business at Havre, France, 7
under the firm name and style of Latham & Company. They are all citizens of the French Republic and reside at Havre, France. The defendants American National Bank of Pensacola and First National Bank of Pensacola are each of them a corporation organized under the laws of the United States and each of them has its home office and its place of business at Pensacola, Florida. The defendant Louisville & Nashville Railroad Company is a corporation organized under the laws of the State of Kentucky and has it home office at Louisville, Ky., but it also does a regular business and maintains a regular place of business at Pensacola, Florida. The defendant American Surety Company of New York 8
is a corporation organized under the laws of the State of New York and has its home office at New York, N. Y., but it also does a regular business and maintains a regular agency at Pensacola, Florida.

SECOND—JURISDICTION.

1. On or about the 11th day of May, 1910, upon the petition of William S. Lovell and Clarence E. Frost, as Receivers in Bankruptcy of Knight, Yancey & Company, and Joe T. Gibson, an unsecured creditor of said bankrupts, this Court duly granted an injunction order in an ancillary bankruptcy proceeding in this Court, entitled 9
"In the Matter of Knight, Yancey & Company, Bankrupts", by which order the Court enjoined and restrained the defendant Louisville & Nashville Railroad Company, among others, "from moving or in any way disposing of any cotton" in its possession or under its control, upon shipments by or for the account of Knight, Yancey & Company, and decreed that said railroad company was "required to hold said cotton pending the further orders of this Court." The cotton set forth in Schedule 1 and Schedule 2, hereto annexed and made a part hereof, was

among the cotton then in the possession of said railroad company at Pensacola, Florida, and under its control, upon shipments by and for the account of Knight, Yancey & Company. Said order was duly served on said railroad company and thereupon the Court acquired dominion over said cotton and the potentiality of possession thereof and on exclusive jurisdiction thereover.

2. Thereafter and on or about the 11th day of June, 1910, the defendant, William S. Lovell the Trustee in Bankruptcy of Knight, Yancey & Company, instituted suit in equity in this Court against the defendants Latham & Company and the defendant Louisville & Nashville Railroad Company. Said suit was brought for the purpose of having said injunction continued and for a delivery of said cotton to said Trustee. Said injunction order was confirmed and continued by the Court by an order entered July 8, 1910. Said last mentioned order also directed that the cotton set forth in Schedule 1 hereto annexed should be delivered by said railroad company to said William S. Lovell as the Custodian of the Court and that, after the receipt thereof by said Custodian, the defendants Latham & Company might obtain the same by filing with the Court a prescribed bond in place thereof. The prescribed bond was duly executed by the defendants Edmond Latham, Charles W. Latham, Raoul Latham and American Surety Company of New York and filed in this Court on or about July 8, 1910. The cotton set forth in said Schedule 1 was duly delivered to said Custodian by said railroad company. On the filing of said bond, said cotton was then duly delivered by said Custodian to the defendants Latham & Company. The condition of said bond was, briefly, that the value of said cotton with interest would be forthcoming to answer the final decree of the Court. Said order also provided that the said William S. Lovell as Custodian of the Court should sell the cot-

ton set forth in Schedule 2 hereto annexed, at the best 13
price obtainable, and deposit the proceeds thereof in the First National Bank of Pensacola, Florida, at the best rate of interest obtainable; and that said funds should be held in said bank, to abide the final decree of the Court, "in exactly the same way that said cotton would be held had the Court not ordered the same sold." Said William S. Lovell as Custodian thereupon sold said cotton and the proceeds thereof remain on deposit to the credit of said Custodian and subject to the decree of the Court. The money so deposited amounts to $72,975.85 or more. The defendants Latham & Company answered said bill of complaint by an answer filed August 9, 1910. The defendant Louisville & Nashville 14
Railroad Company answered said bill of complaint by answer filed September 19, 1910. The said suit is still pending and undetermined.

3. The complainants, Knauth, Nachod & Kuhne, assert an interest in a part of said cotton and in the bond therefor and in the proceeds thereof that is prior and paramount both to that of said Latham & Company and to that of said Lovell as Trustee. The property is in this district. The matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States. The said suit instituted by 15
said Lovell as Trustee was between a citizen of a State and foreign citizens. This suit is between citizens of different States. Said Lovell as Trustee bases his claim on Section 70 and other provisions of the Bankruptcy Act. The complainants, Knauth, Nachod & Kuhne, base their claim on the laws of the United States, as well as the laws of different States, including Section 70 and other provisions of the Bankruptcy Act. So far as the complainants Knauth, Nachod & Kuhne are concerned, however, jurisdiction is predicated, without waiving

16 other grounds, on the fact that the Court, in equity, has impounded the subject matter or *res* of the controversy within its exclusive jurisdiction and that they have the right, therefore, to have their claim thereto heard and determined herein.

THIRD—FACTS.

1. During the period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter until their adjudication of bankruptcy, John W. Knight, of Decatur, Alabama; William J. Yancey, of Memphis, Tennessee; William D. Nesbitt of Birmingham, Alabama; and Robert
17 H. Nesbitt, of Spartanburg, South Carolina, were co-partners in business doing business at Decatur, Alabama, under the firm name and style of Knight, Yancey & Company, as dealers on cotton. They also maintained branch offices at various other places, particularly at Selma, Ala., and Mobile, Ala. During the said period and until their adjudication of bankruptcy and down to the present time, said Knight, Yancey & Company were hopelessly insolvent and knew that they were insolvent and unable to pay their debts. All the acts of said Knight, Yancey & Company hereafter set forth were committed by them while insolvent and while they knew that they were insolvent and unable to pay their honest debts.

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2. During said period from the 5th to the 18th days of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York, N. Y., some thirteen drafts or foreign bills of exchange to which were attached, among other things, thirteen export bills of lading purporting to show that thirteen hundred (1300) bales of cotton had been delivered by said Knight, Yancey & Company to common carriers for transportation to Liverpool, England, and to Bremen, Germany, and to Reval, Russia, or to other European ports, and for

delivery, at the various ports of destination, to the order 19
of said Knight, Yancey & Company, some of said bills of lading purporting to have been issued by the Southern Railway Company and some purporting to have been issued by the Louisville & Nashville Railroad Company. Said drafts were drawn to the order of Knight, Yancey & Company; and the cotton mentioned in said bills of lading was to be delivered to the order of said Knight, Yancey & Company; and the insurance certificates thereto attached were payable, in case of loss, to said Knight, Yancey & Company; and all were indorsed by said Knight, Yancey & Company. Said drafts, bills of lading and other papers were forwarded to New York for the purpose of having the same sold and delivered to the com- 20
plainants, Knauth, Nachod & Kuhne, or other purchasers, as genuine and valid documents and with the intent that said Knauth, Nachod & Kuhne, or other purchasers, should be misled and deceived into the belief that the said bills of lading were genuine and represented actual shipments of the thirteen hundred (1300) bales of cotton therein mentioned and should purchase said foreign drafts on the strength of said bills of lading. Said Knauth, Nachod & Kuhne were in fact misled and deceived and did believe that said bills of lading were genuine and represented actual shipments of the thirteen hundred (1300) bales of cotton therein mentioned; and, on the faith thereof, took and received the said bills of 21
lading with the drafts prefixed thereto and delivered over the sum of $98,005.58, except that $154.20 thereof were protest fees and cable charges subsequently paid on account of said drafts.

3. Some of said drafts matured ninety days after sight and the rest sixty days after sight. The following is a statement of the date of each of the said drafts; the date of each of the said bills of lading thereto attached; the number of bales and marks of the cotton; and the amount

22 of each of the said drafts, your orators being ready to file a copy of said drafts and of the bills of lading thereto annexed and to produce the originals thereof as the Court may direct, to wit:

| Date of Draft, 1910. | Date of B/L 1910. | Number of Bales of Cotton and Marks. | Amount of Drafts. |
|---|---|---|---|
| April 9 | April 9 | 100 PALM—Reichsmarks | 31,604. |
| " 9 | " 9 | 100 QEKP— " | 31,394. |
| " 9 | " 9 | 100 RBUZ— " | 31,650. |
| " 11 | " 9 | 100 QHNN—Francs | 38,924. |
| " 8 | " 8 | 100 PAIY —Sterling | 1571- 5- 8. |
| " 8 | " 8 | 100 PUUN— " | 1579-17-11. |
| " 8 | " 8 | 100 QAAR— " | 1560-18- 6. |
| " 8 | " 8 | 100 QUHH— " | 1574-13- 1. |
| " 8 | " 8 | 100 RFFF— " | 1574- 3- 1. |
| " 8 | " 8 | 100 RUKR— " | 1578- 3- 0. |
| 23 " 8 | " 7 | 100 QRRT— " | 1548-15- 9. |
| " 8 | " 7 | 100 QAJJ— " | 1534-16- 7. |
| " 8 | " 7 | 100 QFNK— " | 1541- 8- 0. |

4. The bills of lading annexed to said drafts were not signed or issued by the railroad companies mentioned therein. The cotton mentioned in said drafts and bills of lading was never delivered to the railroad companies. On the contrary, said bills of lading were signed either by said John W. Knight, or other persons unknown at this time to said Knauth, Nachod & Kuhne. No cotton was ever delivered on said bills of lading by the carriers to complainants or to any one else as the indorsee of said
24 Knight, Yancey & Company. The drawers, Knight, Yancey & Company had not provided for the acceptance of said drafts and had not provided the drawees of said drafts with funds with which to pay the same. Said drafts were duly presented for acceptance, before said Knauth, Nachod & Kuhne had any knowledge of the said fraud, and acceptance thereof was refused. Said drafts were duly protested for non-acceptance and due notice thereof given to said Knight, Yancey & Company and to all other parties thereto, at an expense to said Knauth, Nachod & Kuhne, in protest fees and cable charges of

$154.20. Neither said drafts nor said protest fees and 25
cable charges, nor any part thereof, have ever been paid to the complainants, Knauth, Nachod & Kuhne. Said Knight, Yancey & Company, and all other persons acting with them in the execution, issue and delivery of said instruments, knew at the time that no cotton had been delivered to the railroad companies and knew that said Knauth, Nachod & Kuhne, or other purchasers, would rely on the same as being genuine and representing actual shipments of cotton and knew that the said Knight, Yancey & Company were insolvent and had no means of repaying the money obtained on said instruments and committed all of said acts for the purpose of obtaining, on the strength of said false documents and said false and 26
fraudulent representations, from said Knauth, Nachod & Kuhne, or others, the said sum of $98,005.58. No cotton has ever been received by said Knauth, Nachod & Kuhne, or by any one else on account of the said bills of lading. Since the discovery of the said fraud, the complainants, Knauth, Nachod & Kuhne, have in no wise affirmed or ratified the transaction or transactions resulting in the delivery over of their said money to the said Knight, Yancey & Company, but, on the contrary, have sought to obtain and have demanded and hereby again demand the return to themselves, as the owners entitled thereto, of their said money (the amount being the sum of $98,-005.58) and demand that said Knight, Yancey & Com- 27
pany and their successors, including said William S. Lovell as their trustee in bankruptcy, account for the said money and for the cotton or other property paid for therewith, or with the proceeds thereof, and reimburse said Knauth, Nachod & Kuhne therefor, with interest thereon from April 18, 1910, at 8% per annum, the legal rate in Alabama. The complainants, Knauth, Nachod & Kuhne are ready, and hereby offer, to surrender the said drafts, bills of lading and other documents upon being reimbursed for the said $98,005.58, with interest; or upon such other terms as the Court shall decree.

28 5. The drafts hereinbefore set forth were forwarded to New York, N. Y., and there sold by said Knight, Yancey & Company to the complainants, Knauth, Nachod & Kuhne, through the instrumentality of the First National Bank of Decatur, Alabama, and its New York correspondent and one Frederick van Gerpen, as the agent and broker of said Knight, Yancey & Company. Said Knight, Yancey & Company utilized said instrumentalities for the further purpose of obtaining from said First National Bank of Decatur the allowance of over-drafts in payment of the price of certain cotton purchased by them. Said Knight, Yancey & Company was engaged in the business of buying and exporting
29 cotton. On the days when said drafts were forwarded to New York, said Knight, Yancey & Company also drew certain drafts on said Frederick van Gerpen, in money of the United States, which drafts were referred to as "currency" drafts to cover them from said drafts in foreign money, referred to as "foreign" drafts. Said currency drafts together with said foreign drafts and pretended bills of lading as collateral thereto, were deposited by said Knight, Yancey & Company in said First National Bank of Decatur for collection and as security for the repayment of certain over-drafts made by said Knight, Yancey & Company in payment of the price of certain cotton purchased by them. Said over-
30 drafts were also secured by the pledge by said Knight, Yancey & Company of the cotton paid for therewith or other cotton pledged in lieu thereof. Said over-drafts were allowed and said pledge effected by taking up drafts accepted by said Knight, Yancey & Company, with compress (Warehouse) receipts or bills of lading attached, and by the payment of checks for cotton on the delivery of compress receipts or bills of lading therefor. The allowance of said over-drafts on the pledge of the cotton thus paid for was in accord with the usages and custom of the business and said First National Bank of Decatur claims that it acted in good faith. The resources of the

local banks were not adequate to finance the business by 31
accepting a pledge of said foreign drafts, payable sixty and ninety days after sight, and it was a usage and custom of the business to sell such foreign drafts in New York. Said currency drafts, with said foreign drafts and accompanying documents as collateral, were employed as a means both of obtaining and securing said overdrafts and of facilitating the remittance of the proceeds of said foreign drafts. Said First National Bank of Decatur also held as security for said over-drafts the acceptance, *pro forma,* of a third party, in compliance with the requirements of the Comptroller of the Currency, but the pledged cotton was regarded as the principal security. Said First National Bank of Decatur forwarded said 32
currency drafts, together with said foreign drafts and pretended bills of lading and other documents as collateral thereto, to its correspondent in New York, N. Y., for collection and credit. On the arrival in New York of said currency drafts together with said foreign drafts and pretended bills of lading and accompanying documents, said foreign drafts and pretended bills of lading and accompanying documents were intrusted to said Frederick van Gerpen, as the agent or broker of said Knight, Yancey & Company, and by said broker or agent sold to the complainants, Knauth, Nachod & Kuhne, as hereinbefore set forth. Upon the sale thereof said Knauth, Nachod & Kuhne paid their money to said agent 33
or broker of said Knight, Yancey & Company, upon the faith of said foreign drafts and pretended bills of lading as hereinbefore set forth. Said agent or broker of said Knight, Yancey & Company then took up said currency drafts with the money of said Knauth, Nachod & Kuhne and paid the amount thereof to said correspondent in New York of said First National Bank of Decatur together with certain moneys of said Knight, Yancey & Company. Said correspondent thereupon and on the days of the receipt of said moneys from said agent or broker placed the amount thereof, including the moneys of said Knauth, Nachod & Kuhne, to the credit of said

First National Bank of Decatur and notified said First National Bank of Decatur thereof by mail. Said notice was received by said First National Bank of Decatur in due course of mail before business hours on the second day thereafter. On receipt of said notices, if not before, said currency drafts were collected by said First National Bank of Decatur and the moneys, including the moneys of said Knauth, Nachod & Kuhne, were held for the account of said Knight, Yancey & Company subject to the repayment of said over-drafts.

6. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was a usage and custom of the business between bankers and their customers in the State of Alabama, including Decatur, for customers, such as Knight, Yancey & Company, to deposit drafts on out-of-town parties, such as said currency drafts on Frederick van Gerpen, for collection and upon the understanding and agreement that the customer should retain the title until collection, remittance and receipt by the depositary bank. It was also a usage and custom of said business in the State of Alabama, including Decatur, for banks accepting such out-of-town drafts for collection, including said First National Bank of Decatur, to direct their collecting correspondent, particularly when collection was made in New York, N. Y., to credit the depositary bank with the proceeds thereof and to hold itself ready to pay the amount of said proceeds to or for the account of its customer upon receipt of notice of the collection thereof. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was the law in the State of Alabama and generally in this country, particularly throughout the South, that a deposit in a bank of drafts upon out-of-town parties was for the purpose of collection; that the title to the instrument remained in the depositor until collection; that the title to the proceeds remained in the depositor until remittance and receipt by the depositary bank; and that, in cases of collection

and credit by a collecting correspondent of the depositary 37
bank, the collection was completed and the money deemed to be received by the depositary bank on receipt of notice that the draft had been collected and credited by such correspondent.

7. After said First National Bank of Decatur had received said moneys, including the moneys of said Knauth, Nachod & Kuhne, the same were all disbursed by said bank, at the instance of said Knight, Yancey & Company, in the purchase and redemption of certain cotton, including a part of the cotton or the bills of lading therefor set forth in Schedule 1 and Schedule 2 hereto annexed. Said Schedule 1 and Schedule 2 hereto annexed 38
include certain cotton or the bills of lading therefor, exceeding three thousand dollars in value, that was thus purchased and redeemed with said moneys of said Knauth, Nachod & Kuhne. The bond hereinbefore set forth remains on file in this Court in lieu of the cotton set forth in Schedule 1 hereto annexed and constitutes the proceeds thereof. The proceeds of the cotton set forth in said Schedule 2 hereto annexed remains on deposit at Pensacola, Florida, or elsewhere, as hereinbefore set forth and, being in part the proceeds of said moneys obtained by said false pretenses and no right of a purchaser for value and without notice having intervened, are subject to a trust or charge in favor of said Knauth, 39
Nachod & Kuhne, to the extent that it was purchased or redeemed with their said moneys or with the fund, including their said moneys, that was remitted to the First National Bank of Decatur as before set forth.

8. On or about the 20th day of April, 1910, said firm of Knight, Yancey & Company was duly adjudicated a bankrupt and on or about the 21st day of April, 1910, Clarence E. Frost and William S. Lovell were appointed Receivers in Bankruptcy of the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of their duties as such Receivers.

40 On or about the 26th day of May, 1910, the defendant William S. Lovell was duly appointed trustee in bankruptcy for the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of his duties as such Trustee. Neither the said Knight, Yancey & Company, nor their Receivers, nor their Trustee, nor any one else, have returned to the said Knauth, Nachod & Kuhne said $98,005.58, or any part thereof. Said William S. Lovell is still acting as said Trustee.

9. The defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, in his bill of complaint in the suit hereinbefore set forth, alleged
41 that the bills of lading for the cotton set forth in Schedule 1 and Schedule 2 hereto annexed were transferred to the defendants Latham & Company in payment or fulfillment of an antecedent indebtedness or obligation of the bankrupts, Knight, Yancey & Company, and that said transfer was made under facts and circumstances constituting a voidable preference. Said Trustee elected in said bill to avoid said transfer and asked that it be set aside and the cotton decreed to belong to him, said Trustee. The defendants Latham & Company in their answer to said bill denied that said bills of lading for the cotton set forth in Schedule 1 and Schedule 2 hereto annexed were transferred to them in payment of an antecedent indebtedness
42 but set forth as facts that said Knight, Yancey & Company had contracted to sell and said Latham & Company had contracted to buy some 7800 bales of cotton and that said Latham & Company had paid the price of said cotton in advance of the shipment thereof and that thereafter said Knight, Yancey & Company transferred the bills of lading for said cotton, together with those for certain other cotton, in performance of said contract of sale. Said Latham & Company also alleged that said Knight, Yancey & Company held said bills of lading in trust for their benefit and merely delivered the same in the execution of such a trust. The facts are that said Latham & Com-

pany, on or about April 14, 1910, demanded the delivery 43
of some 7800 bales of cotton claimed to be due them from said Knight, Yancey & Company on account of an antecedent contract of sale and, on said demand, obtained the bills of lading for the cotton set forth in Schedule 1 and Schedule 2 hereto annexed, without any new or other consideration therefor.

10. At the time when the defendants Latham & Company obtained from the bankrupts, Knight, Yancey & Company, the bills of landing for the cotton set forth in Schedule 1 and Schedule 2 hereto annexed, the said Knight, Yancey & Company were insolvent and knew that they were insolvent and intended, by the delivery 44
of said bills of lading, to give to said Latham & Company a preference over other creditors of the same class. At the time said Latham & Company received said bills of lading, they had reasonable and probable cause to believe, and did in fact believe, that the said Knight, Yancey & Company were insolvent and were delivering said bills of lading to them with the intent to give them, said Latham & Company, a preference over the other creditors of the same class. Said bills of lading were obtained by said Latham & Company within four months immediately preceding the adjudication of bankruptcy of said Knight, Yancey & Company. No further credit was thereafter given by said Latham & Company to said 45
Knight, Yancey & Company, in good faith or otherwise, either with or without security. Said Latham & Company, having obtained said preference, cannot come into equity with clean hands. Furthermore, said Knight, Yancey & Company delivered said bills of lading to said Latham & Company, while insolvent and within four months immediately preceding their adjudication of bankruptcy, with the intent and purpose on their part to hinder, delay and defraud their other creditors, including said Knauth, Nachod & Kuhne with whose moneys a part of the cotton set forth in Schedule 1 and

Schedule 2 hereto annexed or the bills of lading therefor had been purchased and redeemed.

11. The bankrupts, Knight, Yancey & Company, obtained the moneys of the complainant, Knauth, Nachod & Kuhne, by false pretenses and held the same in trust for their benefit. Said bankrupts also held the entire fund or bank credit including said moneys subject to a trust or charge for their benefit. Said bankrupts then disbursed said entire fund or bank credit, including the moneys of said Knauth, Nachod & Kuhne, in the purchase and redemption of certain cotton and then held the cotton thus purchased and redeemed subject to a trust or charge for the benefit of said Knauth, Nachod & Kuhne. To the extent of said $98,005.58 and interest thereon from April 18, 1910, said cotton and the proceeds thereof equitably belongs to said Knauth, Nachod & Kuhne. The defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company stands merely in the place and stead of said bankrupts. Said Trustee has acquired or claims all of said cotton thus purchased and redeemed. The complainants, Knauth, Nachod & Kuhne, duly rescinded and do hereby again rescind the purchase of said foreign drafts and pretended bills of lading and have duly demanded and do hereby again demand that said bankrupts and said Trustee account for said moneys of said Knauth, Nachod & Kuhne, amounting to Ninety-eight thousand five and 58/100 dollars ($98,005.58) and for the cotton purchased and redeemed therewith and for the cotton purchased and redeemed with the fund or bank credit, including said moneys and for the proceeds thereof. Said bankrupts and said Trustee have refused said demands. The assets of said bankrupts amount to only about Six hundred thousand dollars ($600,000), while their liabilities amount to about Five million ninety thousand one hundred seventy-three and 84/100 dollars ($5,090,173.84). The complainants, Knauth, Nachod & Kuhne, have no adequate remedy at law. Neither the defendants

Latham & Company nor any other creditors of the bank- 49
rupts have any right to payment out of the moneys of said Knauth, Nachod & Kuhne or the proceeds thereof.

FOURTH—NON-PARTIES.

The members of the firm of Knight, Yancey & Company hereinbefore mentioned, though they may appear to be proper parties, are not made parties to this bill because they are not within the Northern District of Florida, the territorial jurisdiction of the Court.

FIFTH—PRAYER. 50

The complainants, Knauth, Nachod & Kuhne, hereby consent that the answer filed July 31, 1911, by the defendant, Louisville & Nashville Railroad Company to their original bill of complaint herein, stand as an answer to this amended bill and waive an answer under oath or affirmation by any defendant and pray for the determination and decree of the Court, as follows:

1. That the complainants, Knauth, Nachod & Kuhne, have duly rescinded the purchase by them of the foreign drafts and bills of lading hereinbefore set forth; and that the bankrupts, Knight, Yancey & Company, received and held certain remittances of money from New York, in- 51
cluding the moneys of said complainants, aggregating the sum of $98,005.58, and held said moneys of said complainants in trust for their benefit and held the entire remittances of which said moneys were a part subject to a trust or charge for the benefit of said complainants, to the extent of said sum of $98,005.58 and interest thereon from April 18, 1910.

2. That said bankrupts disbursed the moneys of said complainants and the entire fund or bank credit of which said moneys became a part in the purchase and redemp-

52 tion of certain cotton or the bills of lading therefor and then held said cotton or said bills of lading subject to a trust or charge for the benefit of said complainants, to the extent of said sum of $98,005.58 and interest thereon from April 18, 1910.

3. That Schedule 1 and Schedule 2 hereto annexed include certain bales of cotton which, or the bills of lading for which, were purchased or redeemed with the moneys of said complainants and, on proof thereof, what bales or part of the cotton set forth in each of said schedules respectively were purchased or redeemed with the moneys of said complainants and what bales or part with
53 the fund or bank credit of which the moneys of said complainants became a part; that a trust or charge in favor of said complainants be impressed on the bond in lieu of the cotton set forth in Schedule 1 and on the proceeds of the cotton set forth in Schedule 2 hereto annexed, to the extent that said cotton or the bills of lading therefor were purchased or redeemed with the moneys of said complainants or with the fund or bank credit of which said moneys became a part and, to the end that said trust or charge be enforced, that the defendants Edmond Latham, Charles W. Latham, Raoul Latham and American Surety Company of New York pay to said complainants the amount of said trust or charge on account of said bond and that
54 the defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company and First National Bank of Pensacola and American National Bank of Pensacola pay to said complainants out of the proceeds of the cotton set forth in said Schedule 2 the amount of said trust or charge on account thereof.

4. That the defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, has acquired or claims the cotton which, or the bills of lading for which, was or were purchased and redeemed with the

moneys of said complainants and with the fund or bank credit of which the moneys of said complainants were a part; that said defendant render an account of said moneys of said complainants, aggregating the sum of $98,005.58, and set forth a full, true and particular account of all and singular the cotton or other property that was purchased or redeemed therewith and of the cotton or other property that was purchased or redeemed with the fund or bank credit of which said moneys were a part; and that said account set forth the marks of the bales of cotton and what has become of the same and the value of any part thereof set forth in Schedule 1 and Schedule 2 hereto annexed. 55

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5. That this bill of complaint be heard and determined in connection with the bill of complaint of the defendant William S. Lovell as Trustee in Bankruptcy (against the defendants Latham & Company and the defendant Louisville & Nashville Railroad Company) in this Court, the bill hereinbefore mentioned.

6. That the complainants, Knauth, Nachod & Kuhne, have such other, further and different relief as justice, equity and the circumstances of the case may require.

REEVES & WATSON,
Solicitors for Complainants,
Pensacola, Florida. 57

BRIESEN & KNAUTH,
Of Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and of Counsel for Complainants.

58 STATE OF NEW YORK }
County of New York } ss.:

AREND H. WEINGARDT, being duly sworn, says:

That he is a member of the firm of Knauth, Nachod & Kuhne, the complainants in the foregoing bill; that the complainants are co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself. That he has heard read the foregoing bill and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true, except that the membership
59 of said firm is set forth as of the time when the suit was instituted.

AREND H. WEINGARDT.

Sworn to before me this }
17th day of April, 1914. }

FRANK F. KIRKPATRICK,
[L. S.] Notary Public, New York County.

60

## SCHEDULE 1.

Cotton delivered to Latham & Company (pursuant to an order of the United States District Court for the Northern District of Florida, dated July 8, 1910) upon the giving of a forthcoming bond in the sum of $240,000.00; some of which cotton was subject, as are the bond and the proceeds thereof, to a trust or charge in favor of Knauth, Nachod & Kuhne:

| Bales | New Marks | Old Marks | | Shipper or place of shipment by Knight, Yancey & Co. |
|---|---|---|---|---|
| 100 | QFEC | 46 | QFEC | Knight, Yancey & Co., Selma |
| | | 25 | JAP | F. F. Johnstone & Co. |
| | | 4 | JIL | Do. |
| | | 25 | JOY | Do. |
| | | — | | |
| 100 | QIFA | 15 | QIFA | SELMA |
| | | 39 | OW*W | Sellers & Orman |
| | | 42 | OJXW | Do. |
| | | 4 | EUHW | Do. |
| | | — | | |
| 100 | REKO | 50 | REKO | Selma |
| | | 25 | RUTT | C. Gunter Elmore |
| | | 25 | RINO | Do. |
| | | — | | |
| 100 | QSGA | 100 | QSGA | Decatur |
| 100 | RLFO | 25 | RLFO | Selma |
| | | 25 | SAD | F. F. Johnstone & Co. |
| | | 25 | SKY | Do. |
| | | 25 | SOX | Do. |
| | | — | | |
| 100 | RNOU | 20 | RNOU | Decatur |
| | | 7 | AID | F. F. Johnstone & Co. |
| | | 25 | SUE | Do. |
| | | 25 | SEW | Do. |
| | | 23 | SIQ | Do. |
| | | — | | |
| 100 | RUSG | 15 | RUSG | Decatur |
| | | 25 | SODJ | C. Gunter Elmore |
| | | 29 | SICW | Do. |
| | | 16 | PLB | F. F. Johnstone & Co. |
| | | 15 | AXKW | Roman Warehouse |
| | | — | | |
| 100 | REMI | 24 | REMI | Decatur |
| | | 76 | ECPW | Sellers & Orman |
| | | — | | |

| | Bales | New Marks | Old Marks | | Shipper or place of shipment by Knight, Yancey & Co. |
|---|---|---|---|---|---|
| 64 | 100 | PLEN | 20 | PLEN | Decatur |
| | | | 65 | PZPO | Thompson & Wallace |
| | | | 15 | VIC | F. F. Johnstone & Co. |
| | 100 | QARI | 15 | QARI | Decatur |
| | | | 49 | KYC | F. H. Lightfoot |
| | | | 36 | OSKA | Thompson & Wallace |
| | 100 | QFAB | 15 | QFAB | Decatur |
| | | | 8 | OSKA | Thompson & Wallace |
| | | | 77 | KYC | F. H. Lightfoot |
| | 100 | PURX | 15 | PURX | Decatur |
| | | | 44 | PZPO | Thompson & Wallace |
| 65 | | | 41 | KYC | F. H. Lightfoot |
| | 100 | PINS | 15 | PINS | Decatur |
| | | | 45 | PZPO | Thompson & Wallace |
| | | | 40 | KYC | F. H. Lightfoot |
| | 100 | RSON | 100 | RSON | Decatur |
| | 50 | RSRE | 37 | FOSS | Thompson & Wallace |
| | | | 13 | KYC | |
| | 100 | RSAT | 25 | OWLL | Thompson & Wallace |
| | | | 37 | FRAM | Do. |
| | | | 6 | TVAV | Do. |
| | | | 7 | QLAS | Do. |
| | | | 25 | AGRD | Do. |
| 66 | 100 | QSTR | 40 | KYC | F. H. Lightfoot |
| | | | 16 | TDNA | Thompson & Wallace |
| | | | 7 | OAKS | Do. |
| | | | 37 | KYC | F. H. Lightfoot |
| | 100 | QSGC | 40 | KYC | F. H. Lightfoot |
| | | | 3 | TOLB | Thompson & Wallace |
| | | | 2 | TOYS | Do. |
| | | | 5 | OWLL | Do. |
| | | | 36 | OSSO | Do. |
| | | | 11 | FOSS | Do. |
| | | | 3 | KYC | F. H. Lightfoot |

| Bales | New Marks | Old Marks | Shippers or place of Shipment by Knight, Yancy & Co. | 67 |
|---|---|---|---|---|
| 100 | RSIC | 15 OTTO | Thompson & Wallace | |
| | | 3 JDNA | Do. | |
| | | 2 TOLB | Do. | |
| | | 4 TVAV | Do. | |
| | | 44 CAKS or OAKS | Do. | |
| | | 32 OWNS | | |
| | | — | | |
| 100 | QSLL | 42 KYC | F. H. Lightfoot | |
| | | 25 PWG | F. F. Johnstone & Co. | |
| | | 18 PVP | | |
| | | 7 JDNA | Thompson & Wallace | |
| | | 3 OWLL | Do. | |
| | | 5 OLAS | Do. | |
| | | — | | |
| 100 | RSOM | 80 KYC | F. H. Lightfoot | 68 |
| | | 20 JDNA | Thompson & Wallace | |
| | | — | | |
| 100 | QNCE or ONCE | 65 KYC | F. H. Lightfoot | |
| | | 15 OWFW | Sellers & Orman | |
| | | 20 OLAS | Thompson & Wallace | |
| | | — | | |
| 100 | QSAT (B) or OSAT (B) | 6 TOLB | Do. | |
| | | 12 SWST | Do. | |
| | | 63 OWNS | Do. | |
| | | 19 KYC | F. H. Lightfoot | |
| | | — | | |
| 100 | PHAL or PWAL | 66 VBSO | Thompson & Wallace | |
| | | 14 PROS | Do. | 69 |
| | | 20 KYC | F. H. Lightfoot | |
| | | — | | |
| 100 | QSUR or OSUR | 13 ONLY | Thompson & Wallace | |
| | | 14 OWLL | Do. | |
| | | 10 FOSS | Do. | |
| | | 63 KYC | F. H. Lightfoot | |
| | | — | | |
| 100 | RSBL | 4 FRAM | Thompson & Wallace | |
| | | 23 ONLY | Do. | |
| | | 40 FROG | Do. | |
| | | 33 KYC | F. H. Lightfoot | |
| | | — | | |

| 70 | Bales | New Marks | Old Marks | Shippers or place of Shipment by Knight, Yancey & Co. |
|---|---|---|---|---|
| | 20 | PZLU | 8 POST | Thompson & Wallace |
| | | | 12 POLE | Do. |
| | 25 | QSAT | 25 ONLY | Thompson & Wallace |
| | 20 | PSHE | 20 KYC | F. H. Lightfoot |
| | 20 | PRIK | 4 POLE | Thompson & Wallace |
| | | | 7 PINT | Do. |
| | | | 9 KYC | |
| | 2635 | | | |

## SCHEDULE 2.

71

Cotton claimed by Latham & Company, which was sold by William S. Lovell (pursuant to an order of the United States District Court for the Northern District of Florida, appointing him its Custodian thereof, dated July 8, 1910) and the proceeds of which are now on deposit by said Custodian until the rights of all parties interested therein can be determined; some of which cotton was subject, as are the proceeds thereof, to a trust or charge in favor of Knauth, Nachod & Kuhne:

| | Bales | New Marks | Old Marks | Shipper or place of shipment by Knight, Yancey & Co. |
|---|---|---|---|---|
| | 100 | RSMX or RSMI | 14 FERD | Thompson & Wallace |
| 72 | | | 58 FRAT | Do. |
| | | | 28 FROM | Do. |
| | 100 | RSCO | 66 TOLB or FOLB | Thompson & Wallace. |
| | | | 34 OMEG | Do. |
| | 100 | RSPZ or RSZT | 22 JDNA | Do. |
| | | | 5 POLE | Do. |
| | | | 49 TPDO | Do. |
| | | | 24 TSUN | Do. |
| | 100 | RSCE | 13 JDNA | Do. |
| | | | 87 FERD | Do. |

| Bales | New Marks | Old Marks | | Shipper or place of shipment by Knight, Yancey & Co. | 73 |
|---|---|---|---|---|---|
| 100 | QSIY or OSIY | 2 | ONLY | Do. | |
| | | 52 | OAKS | Do. | |
| | | 15 | OPRA | Do. | |
| | | 31 | OWLL | Do. | |
| 100 | RSEA | 1 | TVAV | Do. | |
| | | 3 | SWST | Do. | |
| | | 2 | YBSO or VBSO | Do. | |
| | | 16 | FRAM | Do. | |
| | | 11 | POST | Do. | |
| | | 33 | PORK | Do. | |
| | | 20 | PROS | Do. | |
| | | 5 | TOLB or FOLB | Do. | |
| | | 9 | KYC | F. H. Lightfoot | |
| 23 | PALS | 23 | PALS | Thompson & Wallace | 74 |
| 50 | POST or PSOT | 50 | POST | Do. | |
| 40 | PINT or PENT | 40 | PINT | Do. | |
| 15 | OPRA | 15 | OPRA | Do. | |
| 2 | KYC | 2 | KYC | F. H. Lightfoot | |
| 29 | XX | 29 | XX | Parker Mer. Co. | |
| 57 | FUSE | 57 | FUSE | Thompson & Wallace | |
| 9 | PILL | 9 | PILL | Do. | |
| 81 | OATS | 81 | OATS | Do. | |
| 59 | FUME or FUNE or FOME | 59 | FUME or FUNE or FOME | Do. | 75 |
| 965 | | | | | |

Filed April 20, 1914.

76 **Trustee's Motion to Dismiss.**

IN THE COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD and others<br>AGAINST<br>WILLIAM S. LOVELL as the custodian of certain property impounded by the above named court and as trustee in bankruptcy of Knight, Yancey &<br>77 Company; Latham & Company and others,<br>Defendants. | In Equity. |

The motion of William S. Lovell as the custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company to dismiss the amended bill, etc. Comes William S. Lovell as the custodian of said property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company and says that the amended bill exhibited against him and others in the above styled cause is insufficient in point of law and moves to dismiss
78 the same upon the following grounds:—

1st. The Bill regarded as a bill of intervention is not in subordination to and in recognition of the propriety of the suit of William S. Lovell etc., against Latham & Company referred to in the amended bill.

2nd. The purposes of the Bill regarded as a bill of intervention are not germane to those of the suit of William S. Lovell as Trustee, etc. against Latham & Company referred to in the original Bill.

3rd. The Bill may not be maintained as an original bill because it appears from the averments of the amended

bill that at the time this suit was brought there was no personal jurisdiction of the Court over the necessary defendants, Latham & Company and the partners composing said firm, and over this respondent; nor was the property the subject matter of the suit within the Court's jurisdiction. 79

4th. Complainants show no right, title or interest in any of the property, the subject matter of the suit, nor any right to personal relief against any defendant.

5th. The amended Bill is a departure from the original.

80

6th. It affirmatively appears from the averments of the Bill that the money which purchased the property, the subject matter of this suit, was not the money of complainants.

7th. It affirmatively appears from the averments of the Bill that the money which purchased the property, or the proceeds thereof, the subject matter of this suit, was money advanced to Knight, Yancey & Company on over-draft by the First National Bank of Decatur, or other bank at Decatur, and that whether the foreign exchange referred to in the original Bill with the drafts on Van Guerpen, therein referred to, were discounted by said Decatur bank or merely taken for collection their proceeds went to reimburse such Decatur bank, and that the bankrupts, Knight, Yancey & Company never received the same nor had any interest therein. 81

8th. It does not appear with sufficient certainty that the money of complainants ever passed into the control of or became subject to the disposition of the bankrupts.

9th. In so far as the Bill seeks to have a trust or charge declared on assets in the hands of the Trustee in Bankruptcy as such because the court of bankruptcy and

82 not this Court is the proper forum for the determination of such contention.

10th. Because the Bill is prolix and redundant.

11th. The averments of the Bill are inconsistent in that in paragraph 5 it is averred:

"Said Knight, Yancey & Company utilized said instrumentalities for the further purpose of obtaining from said First National Bank of Decatur the allowance of over-drafts in payment of the price of certain cotton purchased by them," while in the seventh paragraph it is averred:

83 "After said First National Bank of Decatur had received said monies, including the monies of said Knauth, Nachod & Kuhne, the same were all disbursed by said Bank at the instance of said Knight, Yancey & Company in the purchase and redemption of certain cotton, including a part of the cotton or the bills of lading therefor set forth in Schedule 1 and Schedule 2 hereto annexed".

12th. Because the Bill is without equity.

13th. Because it affirmatively appears from the Bill that the money of complainants was by the bankrupts converted into cotton and the cotton into which such
84 money was convered is not described or referred to or traced with sufficient certainty.

14th. Because it affirmatively appears from the Bill that the money of complainants was converted by the bankrupts into a mass of cotton into only a part of which complainants seek to trace their money and they do not identify that portion of such mass into which they seek to trace their money.

15th. And for matter in abatement this respondent says that this Bill ought not to be maintained because prior to the institution of this suit the thirty-six hundred

bales of cotton claimed by Latham & Company and by 85
the respondent as Trustee in bankruptcy of Knight, Yancey & Company had either been released to Latham & Company by the order of this Court, or converted into money by this respondent, and that both the bond given by Latham & Company referred to in the bill and the proceeds of the nine hundred and sixty-five bales of cotton converted into money by this respondent were and were held for the sole purpose of abiding the result of the suit of this respondent as Trustee in Bankruptcy of Knight, Yancey & Company against Latham & Company, and that the rest was not being administered by this Court in such sense that a third party might file either an original bill or bill of intervention or any other 86
action at law or in equity to determine a claim thereto independent of the claim involved in the controversy between this respondent as such Trustee and Latham & Company; that necessary respondents to this Bill, namely Latham & Company and the partners composing said firm, as well as this respondent as such Trustee in bankruptcy of Knight, Yancey & Company did not reside in and were not found within the jurisdiction of this Court, and that such Trustee in Bankruptcy was not appointed by this Court; that none of the bankrupts at the time of the institution of this suit resided in nor have since resided in nor were found within the jurisdiction of this Court, and that the administration of the bankrupt 87
estate of Knight-Yancey & Company was, at the time of this suit and is now, pending in the Northern District of Alabama and that this suit is not such that substituted service might be had upon such non-resident respondents.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company and as Custodian of the funds referred to in the original Bill.

88 STATE OF ALABAMA:
Jefferson County:

WILLIAM S. LOVELL, being duly sworn deposes and says that the statements of fact contained in the paragraph numbered fifteen above are true.

WILLIAM S. LOVELL.

Sworn to and subscribed before me this 20th day of August, 1914.

ANNIE L. PEACE,
(SEAL) Notary Public.

Filed August 22, 1914.

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89

## Latham & Co.'s Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

FREDERICK NACHOD and others, Complainants

AGAINST

WILLIAM S. LOVELL as custodian, etc. and others, Defendants.

In Equity

90

Come now Edmond Latham, Charles W. Latham and Raoul Latham, trading under the partnership name of Latham & Company, made defendants herein, and move the Court that it dismiss the Bill of Complaint and the amended Bill of Complaint filed herein by Frederick Nachod and others, complainants, for the reasons and caused specified as follows, to-wit:

FIRST: If and in so far as the amended Bill purports to be a supplemental bill it does not comply with

the equity rules prescribed by the Supreme Court of 91
the United States.

SECOND: If and in so far as the amended Bill purports to amend the original Bill herein it sets up a state of facts and grounds for relief wholly different from those set forth in the original Bill and prays and prays for wholly different relief and is a departure from the case stated in the original Bill and inconsistent therewith and should not be allowed.

THIRD: The original Bill herein and said amended Bill on their faces do not state such facts as constitute a valid cause of action in equity against these defendants.
92

FOURTH: The original Bill and the amended Bill herein on their faces state such facts as to show that complainants are not entitled to the relief prayed for as against these defendants.

FIFTH: The original Bill and the amended Bill on their faces show that no equitable relief against these defendants can be granted for the reason that the facts alleged show that the relief, if any should be against the Trustee in Bankruptcy alone, and cannot be granted in this suit.

SIXTH: The original Bill and the amended Bill on their faces do not show such a state of facts as would 93
justify a court of equity in impressing the thirty-six hundred bales of cotton, or any part thereof claimed by Latham & Company with a trust in favor of complainants.

Wherefore these defendants pray that the original Bill of Complaint and the amended Bill herein may be dismissed at complainants' costs. And they pray for such further orders and decrees in the premises as may be just and proper.

E. C. MAXWELL,
Solicitor for the above named Defendants.

Filed August 22, 1914.

94 **Surety's Co.'s Motion to Dismiss.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FREDERICK NACHOD AND OTHERS, Complainants<br>AGAINST<br>95 WILLIAM S. LOVELL as CUSTODIAN, ETC. and OTHERS, Defendants. | In Equity. |

Comes now the American Surety Company of New York, made defendant herein, and moves the Court that it dismiss the Bill of Complaint and the amended Bill of Complaint filed herein by Frederick Nachod and others, complainants, for the reasons and causes specified as follows, to wit:

FIRST: If and in so far as the amended Bill purports to be a supplemental bill it, does not comply with
96 the equity rules prescribed by the Supreme Court of the United States.

SECOND: If and in so far as the amended Bill purports to amend the original Bill herein it sets up a state of facts and grounds for relief wholly different from those set forth in the original Bill and prays for, wholly different relief and is a departure from the case stated in the original Bill and inconsistent therewith and should not be allowed.

THIRD: The original Bill herein and said amended Bill on their faces do not state such facts as constitute

a valid cause of action in equity against these defendants. 97

FOURTH: The original Bill and the amended Bill herein on their faces state such facts as to show that complainants are not entitled to the relief prayed for as against these defendants.

FIFTH: The original Bill and the amended Bill on their faces show that no equitable relief against this defendant can be granted for the reason that the facts alleged show that the relief, if any, should be against the Trustee in bankruptcy alone, and cannot be granted in this suit. 98

SIXTH: The original Bill and the amended Bill on their faces do not show such a state of fact as would justify a court of equity to impressing the thirty-six hundred bales of cotton, or any part thereof claimed by Latham & Company, with a trust in favor of complainants.

WHEREFORE this defendant prays that the original Bill of complaint and the amended Bill herein may be dismissed at complainants cost. And it prays for such further orders and decrees in the premises as may be just and proper.

E. C. MAXWELL, 99
Solicitor for the above named Defendant.

Filed August 22, 1914.

100 **Complainants' Objections to Motions.**

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

101 WILLIAM S. LOVELL, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company; and others,
Defendants.

In Equity.

The complainants, Knauth, Nachod & Kuhne, object to the motion of the defendant Lovell as Custodian and as Trustee, to dismiss the amended bill of the complainants, and to the motion of the defendants Latham, to dismiss the bill and the amended bill of the complainants, and to the motion of the defendant American Surety
102 Company of New York, to dismiss the bill and the amended bill of the complainants. Without waiving other grounds of objection, the complainants specify the following objections to each of said motions:

1. So far as any of said motions is based both on a want of jurisdiction and a want of equity, said grounds are repugnant and exclusive. A motion to dismiss for want of jurisdiction admits the cause of action alleged in the amended bill and errors or defects, if any, must be disregarded, because they are curable by amendment (Rules 19 and 28, Present Equity Rules), and because to predicate a want of jurisdiction is to predicate a want

of power to pass on the merits of the amended bill. A motion to dismiss for want of equity admits jurisdiction and asks the Court to pass on the merits of the amended bill.

2. The Court has already determined that it has jurisdiction (upon defendants' motions to quash service of process and to dismiss the original bill of complaint) and is not authorized to review its own decisions in that regard.

3. None of the defendants has a right to have his or their or its motion to dismiss on the ground of want of equity called up and disposed of before final hearing. None of them has answered the amended bill or waived his or their or its right to answer the same or conceded the claim of the complainants (except for the purposes of his or their or its motion) and the Court is not in a position to exercise a discretion under Rule 29 of the present Equity Rules to allow any of said motions to be called up and disposed of before final hearing. Said discretion should be exercised, complainants submit, only in case the controlling facts in the case are conceded for all purposes, either by answer or otherwise, so that a disposal of the points of law presented will be necessary and will, in effect, finally dispose of the whole or a material part of the cause of action, whether in favor of complainants or defendants.

4. The application to dismiss the amended bill for want of jurisdiction is in effect an application to have the government of the United States, acting through its judicial department, deprive the complainants of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States. The construction and application of the constitutional inhibition was involved in the original proceedings, set forth in the amended bill of the

106 complainants, as well as in this case. The relief sought in said original proceedings gave the Court exclusive jurisdiction and that carried with it the jurisdiction and duty to hear and determine and enforce the rights of all claimants of the property impounded and sequestered. To disclaim said ancillary jurisdiction or duty is to violate said constitutional inhibition.

5. The grounds, on which each of said motions is made, are not in accord with the allegations of the amended bill and are untenable in point of law.

Dated April 14, 1915.

WATSON & PASCO,
107 Solicitors for Complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of solicitors and counsel for Complainants.

Filed June 28, 1915.

108

## Order of Dismissal.

109

IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDERICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE, partners as Knauth, Nachod & Kuhne,
Complainants,

110

vs.

WILLIAM S. LOVELL, as the custodian of certain property impounded by the above named court, and as Trustee in Bankruptcy of Knight, Yancey & Company; EDMOND LATHAM, CHARLES W. LATHAM, RAOUL LATHAM, composing the firm of Latham & Company; AMERICAN NATIONAL BANK OF PENSACOLA; FIRST NATIONAL BANK OF PENSACOLA; LOUISVILLE & NASHVILLE RAILROAD COMPANY; and AMERICAN SURETY COMPANY OF NEW YORK,
Defendants.

In Equity.

111

The above styled cause coming on for hearing on the motions filed by the defendants, William S. Lovell, as Trustee in Bankruptcy of Kinght, Yancey & Company, Latham & Company, and American Surety Company, to

112 dismiss the amended bill of complaint, and on the objections of the complainants to said motions, and same having been argued by counsel for the respective parties, it is ordered that the objections to said motions be overruled.

And the court having considered said motions to dismiss and the said amended bill of complaint, and being of the opinion that this court is without jurisdiction of the subject matter of the litigation, and that the proper forum for the relief sought is the bankruptcy court of the Northern District of Alabama,

It is therefore ordered, adjudged and decreed that said amended bill be and it is hereby dismissed at the cost
113 of the complainants.

Done and ordered at Pensacola, Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Filed July 10, 1915.

114

## Assignment of Errors. 115

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

WILLIAM S. LOVELL, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company; and others,
Defendants. 116

The complainants, Knauth, Nachod & Kuhne (being about to ask for the allowance of an appeal to the Supreme Court of the United States from the order or decree of this Court made and entered herein on or about the 10th day of July, 1915) hereby make the following assignment of errors in the said order and in the proceedings of the Court:

1. The District Court erred in dismissing the amended bill of complaint of the complainants, Knauth, Nachod & Kuhne. It had impounded and taken possession of property which equitably belonged to said complainants and holds the proceeds thereof. 117

Its jurisdiction is exclusive of all other tribunals. The said complainants are entitled to have their claim to said property and its proceeds heard and determined herein and the said order or decree, dismissing their bill for want of jurisdiction, deprives them of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States.

118 2. The District Court erred in holding that the property in question is *in custodia legis* of the bankruptcy court for the Northern District of Alabama. Said bankruptcy court has never had possession or jurisdiction thereof. Said property had been transferred by the bankrupts and was held adversely to their Receivers and to their Trustee. The conditions on which said transfer is voidable must be established and the transfer must be set aside before said bankruptcy court will have any jurisdiction of the same.

3. The District Court erred in holding the law against the complainants, Knauth, Nachod & Kuhne. The order
119 or decree dismissing the amended bill of said complainants is contrary to the facts admitted in the cause and contrary to law and contrary to equity.

WATSON & PASCO,
Solicitors for complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

Filed July 10, 1915.

120

## Appeal.

121

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

WILLIAM S. LOVELL, as the custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company and others,
Defendants.

122

The complainants, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne (being the survivors of themselves and Friedrich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne) conceive themselves aggrieved by the order or decree made and entered, in the above 123
entitled cause, on the 10th day of July, 1915, and do hereby appeal from said order or decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors which is presented and to be filed herewith. The appeal is taken to said Supreme Court, pursuant to Sec. 238 of The Judicial Code, because the jurisdiction of the above named court is in issue and the case involves the construction and application of the Constitution of the United States and draws in question the constitutionality of certain laws of the United States. That is to say the record presents the question whether the laws authorizing the court to im-

124 pound and hold the property in question, under the facts and circumstances of the case, are not unconstitutional and void unless they also vest it, either expressly or by necessary implication, with jurisdiction to hear and determine the claim of the complainants to said property.

WHEREFORE the said complainants pray that this appeal be allowed; and that a transcript of the record of the proceedings and papers on which said order or decree was made be duly authenticated and sent to the Supreme Court of the United States.

WATSON & PASCO,
Solicitors for Complainants,
125 Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

IT IS ORDERED that the foregoing appeal be and hereby is allowed as prayed for.

Dated this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

126 Filed July 10, 1915.

## Bond on Appeal.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE and others, formerly composing the firm of KNAUTH, NACHOD AND KUHNE,
Complainants,

vs.

WILLIAM S. LOVELL, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey and Company,
Defendants.

KNOW ALL MEN BY THESE PRESENTS, That Knauth, Nachod & Kuhne as principal, and NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named William S. Lovell as said Custodian and Trustee; Edmond Latham, Charles Latham and Raoull Latham, composing the firm of Latham & Company; and the American Surety Company of New York, in the sum of Five Hundred ($500.00) Dollars to be paid to the said obligees, their executors, administrators, successors and assigns for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 6th day of July, 1915.

130 WHEREAS, the above named Knauth, Nachod & Kuhne are about to prosecute an appeal to the Supreme Court of the United States, to reverse the order or decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the Northern District of Florida.

NOW, THEREFORE, the condition of this obligation is such, that if the above named Knauth, Nachod & Kuhne shall prosecute the said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

131 KNAUTH, NACHOD & KUHNE,
By GEO. T. HOGG, of Counsel.
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
N. V. TYNAN,
[SEAL.] Resident Assistant Secretary.

132

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY. 133

STATE OF NEW YORK }
County of New York } ss.:

On this 6th day of July one thousand nine hundred and fifteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the NATIONAL SURETY COMPANY, the corporation described in and which executed the within and foregoing Bond of Knauth, Nachod & Kuhne as a surety thereon, who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; 134 that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said NATIONAL SURETY COMPANY, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Knauth, Nachod & Kuhne is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant 135 Secretary of said Company; that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Three Million Five Hundred Thousand ($3,500,000.) Dollars.

That R. R. Turnbull of Pensacola, Florida is agent to

136 acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON

Sworn to, acknowledged before me, and subscribed in my presence this 6th day of July, 1915.

[SEAL.] P. P. MARCONE

Notary Public for N. Y. County #2380; etc.

Approved July 10, 1915.

WM. B. SHEPPARD, District Judge.

Filed July 10, 1915.

---

137 **Citation.**

DISTRICT COURT OF THE UNITED STATES

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

WILLIAM S. LOVELL, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company;
Defendants.

138

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To William S. Lovell, as the Custodian of certain property impounded by the above named Court and as Trustee in Bankruptcy of Knight, Yancey & Company; Edmond Latham, Charles Latham and Raoul Latham composing the firm of Latham & Company; and the American Surety Company of New York—GREETING:

YOU ARE HEREBY CITED and admonished to be and appear in the Supreme Court of the United States, at

the City of Washington in the District of Columbia, 139
thirty days after the date of this citation (pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Northern District of Florida, wherein Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth, and Percival Kuhne, being the survivors of themselves and Friederich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne, are appellants and you are appellees) to show cause, if any there be, why the order or decree rendered against said appellants, as in said appeal mentioned, should not be reversed and why speedy justice should not be done the 140
parties in that behalf.

WITNESS Hon. WILLIAM B. SHEPPARD, Judge of the District Court of the United States for the Northern District of Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Service for W. S. Lovell accepted this July 10, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for Lovell.

141

Service on behalf of Edmond Latham, Charles Latham, and Raoul Latham, composing the firm of Latham & Company, is hereby accepted, and service on behalf of American Surety Company is also hereby accepted.

E. C. MAXWELL,
Solicitor for said defendants.

Filed July 10, 1915.

142 **Praecipe on Appeal.**

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD, and others, Complainants, AGAINST 143 WILLIAM S. LOVELL, as Custodian etc., and as Trustee etc., and others Defendants. | In Equity No. 4. |

Pursuant to rules 75-76 of the present Equity Rules, the complainants Knauth, Nachod & Kuhne hereby indicate the following as the papers to be incorporated in the transcript of record on their appeal to the Supreme Court of the United States from the decree herein of July 10, 1915, to wit:

1. The amended bill of complaint.

144 2. The written motion to dismiss said bill by the defendant Lovell, as Custodian and Trustee.

3. The written motion to dismiss said bill by the defendants composing the firm of Latham and Company.

4. The written motion to dismiss said bill by the defendant American Surety Company of New York.

5. The written objections by complainants to said motions.

6. The decree dismissing said bill.

7. The Assignment of Errors. 145

8. The appeal and the allowance thereof.

9. The bond on appeal.

10. The citation on appeal.

WATSON & PASCO,
Solicitors for Appellants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Appellants,
25 Broad Street,
New York, N. Y. 146

W. H. WATSON,
Of Counsel.

Due service of a copy of the foregoing *præcipe* is admitted this 28th day of July, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors and of Counsel for defendant William S. Lovell, as Custodian, etc., and as Trustee, etc.
E. C. MAXWELL,
Solicitors and of Counsel for the defendants, members of the firm of Latham & Company and for American Surety Company of New York. 147

Filed July 28, 1915.

148

## Order of Enlargement.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

WILLIAM S. LOVELL, as Custodian etc. and as Trustee etc. and others,
Defendants.

149

This cause came on to be further heard at this time and was submitted by counsel for complainants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as following; viz.:

That the time for certification and filing of the transcript of the record upon the appeal herein, allowed July 10, 1915, be and the same hereby is extended for the period of thirty days from August 9, 1915.

Dated August 9, 1915.

WM. B. SHEPPARD,
District Judge.

150

We hereby consent to the above order.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for defendant Lovell as custodian etc. and as trustee etc.

E. C. MAXWELL,
Solicitor for defendants Latham and American Surety Company of New York.

Filed August 9, 1915.

**Further Order of Enlargement.** 151

IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD *et al.*,
Complainants,

vs.

WM. S. LOVELL, as custodian, etc., and as trustee, etc., *et al.*,
Defendants. 152

This cause came on to be further heard at this time, and was submitted by counsel for complainants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

That the time for certification and filing of the transcript of the record upon the appeal herein allowed July 10, 1915, be, and the same is hereby, extended for the period of thirty days from September 6, 1915.

Dated September 4th, 1915.

WM. B. SHEPPARD, 153
District Judge.

We hereby consent to the above order.

BLOUNT & BLOUNT & CARTER,
Solicitors for Defendant Lovell, as Custodian, etc., and as Trustee, etc.

E. C. MAXWELL,
Solicitor for Defendants Latham & Company, and American Surety Company of New York.

154 **Authentication of Record.**

UNITED STATES DISTRICT COURT,
Northern District of Florida. } ss.:

I, FREDERICK W. MARSH, Clerk of said Court, do hereby certify that the foregoing is a true and correct transcript of the papers mentioned in the *præcipe* of the complainants in the cause in equity therein set forth and constitute the record and proceedings of this court on the appeal to the Supreme Court of the United States in said cause, no *præcipe* having been filed by any of the defendants, and no opinion in writing having been ren-
155 dered by the District Judge on granting the motions to dismiss; and that said record remains on file in said cause in my office as Clerk of said Court.

IN WITNESS WHEREOF I do hereto set my hand and affix the seal of said court at the City of Pensacola, Florida, this 6th day of September, 1915.

FREDERICK W. MARSH,
[L. S.] Clerk.

156

# (24,940)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1915.**

# No. 657.

MAX JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, APPELLANTS,

*vs.*

MAURICE E. A. WESTPHALEN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1915.

**Amended Bill.** 1

# District Court of the United States,

## NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE, Complainants, | |
| AGAINST | In Equity. 2 |
| MAURICE E. A. WESTPHALEN; MADAM MCLEOD WESTPHALEN; WILLIAM S. LOVELL, as Trustee in Bankruptcy of the Estate of KNIGHT, YANCEY & COMPANY; and LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendants. | |

The complainants above named, Knauth, Nachod & Kuhne, make this their amended bill of complaint (or whatever it should be denominated) against the defendants above named and allege, on information and belief: 3

FIRST—NAME ETC., OF PARTIES.

1. The complainants are copartners in business, doing business as international bankers and maintaining a banking house at New York, N. Y., and at Leipzig, Germany, under the firm name and style of Knauth, Nachod & Kuhne. Said Friedrich Nachod, Max Jaffe and August Stern are citizens or subjects of Germany and reside at Leipzig, Germany. Said Wilhelm Knauth

4 is a citizen or subject of Germany and resides at Arrochar, County of Richmond, City and State of New York. Said Arend H. Weingardt is a citizen or subject of Germany and resides at Montclair, Essex County, New Jersey. Said Oscar L. Gubelman is a citizen of the State of New Jersey and resides at West Orange, Essex County, New Jersey. Said Rollin C. Newton is a citizen of the State of New York and resides at Scarsdale, Westchester County, New York. Said Mary W. Knauth and Percival Kuhne are citizens of the State of New York and reside in the County, City and State of New York.

5 2. The defendants Maurice E. A. Westphalen and Madam McLeod Westphalen are copartners in business, the latter *in commendam*, doing business at Havre, France, under the firm name and style of Westphalen & Company. They are both citizens of the French Republic and reside at Havre, France. The defendant, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, is a citizen of the State of Alabama and resides at Birmingham, Jefferson County, Alabama, and was appointed as said Trustee by the United States District Court for the Northern District of Alabama, Northeastern Division. The bankrupts, Knight, Yancey & Company, were a copartnership firm and had their
6 general office at Decatur, Morgan County, Alabama, where the active partner, John W. Knight, resided and managed the business of the firm. The defendant Louisville & Nashville Railroad Company, is a corporation organized under the laws of the State of Kentucky and has its home office at Louisville, Ky., but it also does business and maintains a regular place of business at Pensacola, Florida.

SECOND—JURISDICTION.

1. On or about the 11th day of May, 1910, upon the petition of William S. Lovell and Clarence E. Frost,

as Receivers in Bankruptcy of Knight, Yancey & Company, and Joe T. Gibson, an unsecured creditor of said bankrupts, this Court duly granted an injunction order, in an ancillary bankruptcy proceeding in this Court, entitled "In the Matter of Knight, Yancey & Company, Bankrupts", by which order the Court enjoined and restrained the defendant Louisville & Nashville Railroad Company, among others, "from moving or in any way disposing of any cotton" in its possession or under its control, upon shipments by or for the account of Knight, Yancey & Company, and decreed that said railroad company was "required to hold said cotton pending the further orders of this Court." The cotton set forth in Schedule 1 hereto annexed and made a part hereof was among the cotton then in the possession of said railroad company at Pensacola, Florida, and under its control, upon shipments by and for the account of Knight, Yancey & Company. Said order was duly served on said railroad company and thereupon the Court acquired dominion over said cotton and the potentiality of possession thereof and the exclusive jurisdiction thereover. 7 8

2. The defendant, Louisville & Nashville Railroad Company refused, on demand, to deliver the cotton set forth in Schedule 1 hereto annexed to the defendants Westphalen & Company and based its refusal on said injunction order. Thereupon and on or about July 1, 1910, said defendants, Westphalen & Company, filed a petition to this Court for the release of the cotton set forth in said Schedule 1 hereto annexed. The defendant Lovell as Trustee and the defendant Louisville & Nashville Railroad Company both filed objections to the release of said cotton. The Court refused said application but granted said Westphalen & Company permission to institute suit in the United States Circuit Court, Northern District of Florida, to recover the same. Thereupon and on or about July 14, 1910, said Westphalen & Company instituted suit by filing a bill of complaint in equity in said Circuit Court against said Lovell as 9

said Trustee and said Louisville & Nashville Railroad Company to establish their title, ownership and right of possession in and to said cotton and to require the delivery of the genuine bills of lading therefor and of the cotton itself to them, said Westphalen & Company. Thereafter and without the consent of this Court or of said Circuit Court, said Westphalen & Company and said Lovell as Trustee and said Louisville & Nashville Railroad Company entered into an agreement, entitled in said suit in said Circuit Court and dated July 14, 1910, under which the cotton set forth in said Schedule 1 was delivered to said Lovell as temporary custodian and sold and the proceeds thereof deposited in the First National Bank of Pensacola, Florida, and the American National Bank of Pensacola, Florida. Said deposit was made in said banks in the matter of said suit in said Circuit Court and subject to the final judgment of the Court and to abide the final decree in said cause, or any other such causes as might finally determine the rights of the parties, and with every right, remedy, recourse and protection reserved to the parties which they could exercise if the cotton had not been sold. The proceeds of said cotton remains on deposit in said banks at Pensacola, Florida, on the said terms and conditions of said agreement. Said railroad company filed its answer to said bill about September 17, 1910. Said Trustee filed a demurrer to said bill of said Westphalen & Company on the merits thereof, about October 3, 1910. With the permission of this Court and on or about February 4, 1911, while the issue raised by said demurrer was undetermined, the complainants, Knauth, Nachod & Kuhne, obtained an order of said Circuit Court permitting them to file their bill of complaint herein as an original bill "in the nature of a cross-bill or otherwise."

3. The complainants, Knauth, Nachod & Kuhne, assert an interest in a part of said cotton or in the proceeds thereof that is prior and paramount both to that of said Westphalen & Company and to that of said

Lovell as Trustee. The property is in this district. The 13
matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States. The said suit instituted by Westphalen & Company was between citizens of a State and foreign citizens. This suit is between citizens of different States. Said Lovell as Trustee bases his claim on Section 70 and other provisions of the Bankruptcy Act. The complainants, Knauth, Nachod & Kuhne, base their claim on the laws of the United States, as well as the laws of different States, including Section 70 and other provisions of the Bankruptcy Act. So far as the complainants Knauth, Nachod & Kuhne are concerned, however, jurisdiction 14
is predicated, without waiving other grounds, on the fact that the Court, in equity, has impounded the subject matter or *res* of the controversy within its exclusive jurisdiction and that they have the right, therefore, to have their claim thereto heard and determined herein.

THIRD—FACTS.

1. During the period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter until their adjudication of bankruptcy, John W. Knight, of Decatur, Alabama; William J. Yancey, of Memphis, Tennessee; William D. Nesbitt of Birmingham, Alabama; 15
and Robert H. Nesbitt, of Spartenburg, South Carolina, were co-partners in business doing business at Decatur, Alabama, under the firm name and style of Knight, Yancey & Company, as dealers in cotton. They also maintained branch offices at various other places, particularly at Selma, Ala., and Mobile, Ala. During the said period and until their adjudication of bankruptcy and down to the present time, said Knight, Yancey & Company were hopelessly insolvent and knew that they were insolvent and unable to pay their debts. All the acts of said Knight, Yancey & Company hereafter set forth were committed by them while insolvent and while

16 they knew that they were insolvent and unable to pay their honest debts.

2. During said period from the 5th to the 18th days of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York, N. Y., some thirteen drafts or foreign bills of exchange to which were attached, among other things, thirteen export bills of lading purporting to show that thirteen hundred (1300) bales of cotton had been delivered by said Knight, Yancey & Company to common carriers for transportation to Liverpool, England, and to Bremen, Germany, and to Reval, Russia, or to other European ports, and
17 for delivery, at the various ports of destination, to the order of said Knight, Yancey & Company, some of said bills of lading purporting to have been issued by the Southern Railway Company and some purporting to have been issued by the Louisville & Nashville Railroad Company. Said drafts were drawn to the order of Knight, Yancey & Company; and the cotton mentioned in said bills of lading was to be delivered to the order of said Knight, Yancey & Company, and the insurance certificates thereto attached were payable, in case of loss, to said Knight, Yancey & Company; and all were indorsed by said Knight, Yancey & Company. Said drafts, bills of lading and other papers were forwarded to New York
18 for the purpose of having the same sold and delivered to the complainants, Knauth, Nachod & Kuhne, or other purchasers, as genuine and valid documents and with the intent that said Knauth, Nachod & Kuhne, or other purchasers, should be misled and deceived into the belief that the said bills of lading were genuine and represented actual shipments of the thirteen hundred (1300) bales of cotton therein mentioned and should purchase said foreign drafts on the strength of said bills of lading. Said Knauth, Nachod & Kuhne were in fact misled and deceived and did believe that said bills of lading were genuine and represented actual shipments of the thirteen

hundred (1300) bales of cotton therein mentioned; and, 19
on the faith thereof, took and received the said bills of lading with the drafts prefixed thereto and delivered over the sum of $98,005.58, except that $154.20 thereof were protest fees and cable charges subsequently paid on account of said drafts.

3. Some of said drafts matured ninety days after sight and the rest sixty days after sight. The following is a statement of the date of each of the said drafts; the date of each of the said bills of lading thereto attached; the number of bales and marks of the cotton; and the amount of each of the said drafts, your orators being ready to file a copy of said drafts and of the bills 20
of lading thereto annexed and to produce the originals thereof as the Court may direct, to wit:

| Date of Draft, 1910. | Date of B/L 1910. | Number of Bales of Cotton and Marks. | Amount of Drafts. |
|---|---|---|---|
| April 9 | April 9 | 100 PALM—Reichmarks | 31,604. |
| " 9 | " 9 | 100 QEKP— " | 31,394. |
| " 9 | " 9 | 100 RBUZ— " | 31,650. |
| " 11 | " 9 | 100 QNNN—Francs | 38,924. |
| " 8 | " 8 | 100 PAIY—Sterling | 1571- 5- 8. |
| " 8 | " 8 | 100 PUUN— " | 5579-17-11. |
| " 8 | " 8 | 100 QAAR— " | 1560-18- 6. |
| " 8 | " 8 | 100 QUHH— " | 1574-13- 1. |
| " 8 | " 8 | 100 RFFF— " | 1574- 3- 1. |
| " 8 | " 8 | 100 RUKR— " | 1578- 3- 0. |
| " 8 | " 7 | 100 QRRT— " | 1548-15- 9. |
| " 8 | " 7 | 100 QAJJ— " | 1534-16- 7. 21 |
| " 8 | " 7 | 100 QFNK— " | 1541- 8- 0. |

4. The bills of lading annexed to said drafts were not signed or issued by the railroad companies mentioned therein. The cotton mentioned in said drafts and bills of lading was never delivered to the railroad companies. On the contrary, said bills of lading were signed either by said John W. Knight or other persons unknown at this time to said Knauth, Nachod & Kuhne. No cotton was ever delivered on said bills of lading by the carriers to complainants or to any one else as the indorsee of said Knight, Yancey & Company. The

22 drawers, Knight, Yancey & Company had not provided for the acceptance of said drafts and had not provided the drawees of said drafts with funds with which to pay the same. Said drafts were duly presented for acceptance, before said Knauth, Nachod & Kuhne had any knowledge of the said fraud, and acceptance thereof was refused. Said drafts were duly protested for non-acceptance and due notice thereof given to said Knight, Yancey & Company and to all other parties thereto, at an expense to said Knauth, Nachod & Kuhne, in protest fees and cable charges of $154.20. Neither said drafts nor said protest fees and cable charges, nor any part thereof, have ever been paid to the complainants, Knauth,
23 Nachod & Kuhne. Said Knight, Yancey & Company, and all other persons acting with them in the execution, issue and delivery of said instruments, knew at the time that no cotton had been delivered to the railroad companies and knew that said Knauth, Nachod & Kuhne, or other purchasers, would rely on the same as being genuine and representing actual shipments of cotton and knew that the said Knight, Yancey & Company were insolvent and had no means of repaying the money obtained on said instruments and committed all of said acts for the purpose of obtaining, on the strength of said false documents and said false and fraudulent representations, from said Knauth, Nachod & Kuhne, or
24 others, the said sum of $98,005.58. No cotton has ever been received by said Knauth, Nachod & Kuhne, or by any one else on account of the said bills of lading. Since the discovery of the said fraud, the complainants, Knauth, Nachod & Kuhne, have in no wise affirmed or ratified the transaction or transactions resulting in the delivery over of their said money to the said Knight, Yancey & Company; but, on the contrary, have sought to obtain and have demanded and hereby again demand the return to themselves, as the owners entitled thereto, of their said money (the amount being the sum of $98,-005.58) and demand that said Knight, Yancey & Company and their successors, including said William S.

Lovell as their trustee in bankruptcy, account for the 25
said money and for the cotton or other property paid for therewith, or with the proceeds thereof, and reimburse said Knauth, Nachod & Kuhne therefor, with interest thereon from April 18, 1910, at 8% per annum, the legal rate in Alabama. The complainants, Knauth, Nachod & Kuhne are ready, and hereby offer, to surrender the said drafts, bills of lading and other documents upon being reimbursed for the said $98,005.58, with interest; or upon such other terms as the Court shall decree.

5. The drafts herein before set forth were forwarded to New York, N. Y., and there sold by said Knight, Yancey & Company to the complainants, Knauth, Nachod 26
& Kuhne, through the instrumentality of the First National Bank of Decatur, Alabama, and its New York correspondent and one Frederick van Gerpen, as the agent and broker of said Knight, Yancey & Company. Said Knight, Yancey & Company utilized said instrumentalities for the further purpose of obtaining from said First National Bank of Decatur the allowance of over-drafts in payment of the price of cotton purchased by them. Said Knight, Yancey & Company was engaged in the business of buying and exporting cotton. On the days when said drafts were forwarded to New York, said Knight, Yancey & Company also drew certain drafts on said Frederick van Gerpen, in money of the United States, 27
which are hereafter referred to as "currency" drafts to contradistinguish them from said drafts in foreign money, hereafter referred to as "foreign" drafts. Said currency drafts, together with said foreign drafts and pretended bills of lading as collateral thereto, were deposited by said Knight, Yancey & Company in said First National Bank of Decatur for collection and as security for the repayment of certain over-drafts made by said Knight, Yancey & Company in payment of the price of certain cotton purchased by them. Said over-drafts were also secured by the pledge by said Knight, Yancey & Company of the

28 cotton paid for therewith or other cotton pledged in lieu thereof. Said over-drafts were allowed and said pledge effected by taking up drafts accepted by said Knight, Yancey & Company, with compress (Warehouse) receipts or bills of lading attached, and by the payment of checks for cotton on the delivery of compress receipts or bills of lading therefor. The allowance of said over-drafts on the pledge of the cotton thus paid for was in accord with the usages and custom of the business and said First National Bank of Decatur claims that it acted in good faith. The resources of the local banks were not adequate to finance the business by accepting a pledge of said foreign drafts, payable sixty and ninety days after
29 sight, and it was a usage and custom of the business to sell such foreign drafts in New York. Said currency drafts, with said foreign drafts and accompanying documents as collateral, were employed as a means both of obtaining and securing said overdrafts and of facilitating the remittance of the proceeds of said foreign drafts. Said First National Bank of Decatur also held as security for said over-drafts the acceptance, *pro forma*, of a third party, in compliance with the requirements of the Comptroller of the Currency, but the pledged cotton was regarded as the principal security. Said First National Bank of Decatur forwarded said currency drafts together with said foreign drafts and pretended bills of lading and
30 other documents as collateral thereto, to its correspondent in New York, N. Y., for collection and credit. On the arrival in New York of said currency drafts together with said foreign drafts and pretended bills of lading and accompanying documents, said foreign drafts and pretended bills of lading and accompanying documents were intrusted to said Frederick van Gerpen, as the agent or broker of said Knight, Yancey & Company, and by said broker or agent sold to the complainants, Knauth, Nachod & Kuhne, as hereinbefore set forth. Upon the sale thereof said Knauth, Nachod & Kuhne paid their money to said agent or broker of said Knight, Yancey & Company, upon the faith of said foreign drafts and pre-

tended bills of lading as hereinbefore set forth. Said 31
agent or broker of said Knight, Yancey & Company then took up said currency drafts with the money of said Knauth, Nachod & Kuhne and paid the amount thereof to said correspondent in New York of said First National Bank of Decatur together with certain moneys of said Knight, Yancey & Company. Said correspondent thereupon and on the days of the receipt of said moneys from said agent or broker placed the amount thereof, including the moneys of said Knauth, Nachod & Kuhne, to the credit of said First National Bank of Decatur, and notified said First National Bank of Decatur thereof by mail. Said notice was received by First National Bank of Decatur in due course of mail before business hours on 32
the second day thereafter. On receipt of said notices, if not before, said currency drafts were collected by said First National Bank of Decatur and the moneys, including the moneys of said Knauth, Nachod & Kuhne, were held for the account of said Knight, Yancey & Company subject to the repayment of said over-drafts.

6. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was a usage and custom of the business between bankers and their customers in the State of Alabama, including Decatur, for customers, such as said Knight, Yancey & Company, to deposit drafts on out-of-town parties, such 33
as said currency drafts on Frederick van Gerpen, for collection and upon the understanding and agreement that the customer should retain the title until collection, remittance and receipt by the depositary bank. It was also a usage and custom of said business in the State of Alabama, including Decatur, for banks accepting such out-of-town drafts for collection, including said First National Bank of Decatur, to direct their collecting correspondent, particularly when collection was made in New York, N. Y., to credit the depositary bank with the proceeds thereof and to hold itself ready to pay the amount of said proceeds to or for the account of its

customer upon receipt of notice of the collection thereof. During said period from the 5th to the 18th days of April, 1910, and prior thereto and thereafter, it was the law in the State of Alabama and generally in this country, particularly throughout the South, that a deposit in a bank of drafts upon out-of-town parties was for the purpose of collection; that the title to the instrument remained in the depositor until collection; that the title to the proceeds remained in the depositor until remittance and receipt by the depositary bank; and that, in cases of collection and credit by a collecting correspondent of the depositary bank, the collection was completed and the money deemed to be received by the depositary bank on receipt of notice that the draft had been collected and credited by such correspondent.

7. After said First National Bank of Decatur had received said moneys, including the moneys of said Knauth, Nachod & Kuhne, the same were all disbursed by said bank, at the instance of said Knight, Yancey & Company, in the purchase and redemption of certain cotton, including a part of the cotton or the bills of lading therefor set forth in Schedule 1 hereto annexed. Said Schedule 1 hereto annexed includes certain cotton or the bills of lading therefor, exceeding three thousand dollars in value, that was thus purchased and redeemed with said moneys of said Knauth, Nachod & Kuhne. The proceeds of the cotton set forth in said Schedule 1 hereto annexed remains on deposit at Pensacola, Florida, as hereinbefore set forth and, being in part the proceeds of said moneys obtained by said false pretenses and no right of a purchaser for value and without notice having intervened, are subject to a trust or charge in favor of said Knauth, Nachod & Kuhne, to the extent that it was purchased or redeemed with their said moneys or with the fund, including their said moneys, that was remitted to the First National Bank of Decatur as before set forth.

8. On or about the 20th day of April, 1910, said firm 37
of Knight, Yancey & Company was duly adjudicated a bankrupt and on or about the 21st day of April, 1910, Clarence E. Frost and William S. Lovell were appointed Receivers in Bankruptcy of the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of their duties as such Receivers. On or about the 26th day of May, 1910, the defendant William S. Lovell was duly appointed trustee in bankruptcy for the estate of said firm and qualified, by giving the prescribed bond, and entered upon the performance of his duties as such Trustee. Neither the said Knight, Yancey & Company nor their Receivers nor their Trustee, nor any one else, have returned to the said Knauth, Nachod 38
& Kuhne said $98,005.58, or any part thereof. Said William S. Lovell is still acting as said Trustee.

9. The defendants Westphalen & Company, by their bill of complaint in said suit in said Circuit Court, claim that the cotton set forth in Schedule 1 hereto annexed was transferred to them, by the shipment thereof by said Knight, Yancey & Company, in payment or fulfillment of an antecedent indebtedness or obligation of said Knight, Yancey & Company to said Westphalen & Company. The fact is that said cotton was shipped to Havre, France, to be there delivered to said Knight, Yancey & Company or their order. The bills of lading therefor ran 39
to said Knight, Yancey & Company or order as consignees and provided that notice of the arrival of said cotton at said port should be given to Messrs. Scheuch & Company. Any rights that said Westphalen & Company have in said cotton are derived from said Scheuch & Company. The bills of lading for said cotton were never delivered however, by said Knight, Yancey & Company to said Westphalen & Company but were retained by them and, after their adjudication of bankruptcy, were delivered to the defendant Lovell as Trustee. The shipment of said cotton was made while said Knight, Yancey & Company were insolvent and within four months before the filing of the

40 petition for the adjudication of bankruptcy; and the effect of the enforcement of any transfer to said Westphalen & Company, by shipment or otherwise, will be to enable them to obtain a greater percentage of their debt than any other creditors of the same class. At the times of shipment of said cotton, said Scheuch & Company and Westphalen & Company had reasonable cause to believe, and did in fact believe, that a transfer, if any, of said cotton was intended by said Knight, Yancey & Company to give them a preference over other creditors of the same class. Neither the said Westphalen & Company nor said Scheuch & Company extended any further credit or parted with any further value, in good faith or otherwise, on
41 account of the shipment or any other act of said Knight, Yancey & Company by which it is claimed that a transfer or application of said cotton to the payment of said antecedent indebtedness or obligation was made. Said Westphalen & Company do not come into equity with clean hands, in that regard at least. The shipment and any other act respecting a transfer or application, if any, of the cotton set forth in Schedule 1 hereto annexed to the payment or fulfillment of said antecedent indebtedness or obligation, was made within four months prior to the filing of the petition for adjudication of bankruptcy and with the intent and purpose on the part of said Knight, Yancey & Company to hinder, delay and defraud their
42 other creditors, including said Knauth, Nachod & Kuhne with whose money a part of said cotton or the bills of lading therefor was purchased and redeemed, and neither said Scheuch & Company nor said Westphalen & Company were purchasers in good faith or for a present fair consideration or upon the parting with any new consideration or value of any kind.

10. The defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, sets up, in his answer to the said bill of complaint of said Westphalen & Company in said suit in said Circuit Court, that he is the owner and holder of the bills of lading for

the cotton set forth in Schedule 1 hereto annexed; also 43
that the shipment thereof and all other acts of Knight, Yancey & Company respecting a transfer, if any, of said cotton to said Westphalen & Company were under facts and circumstances such as are hereinbefore set forth as constituting a voidable preference. Said Trustee elects in said answer to avoid any such transfer and asks that the same be decreed void and that the title to said cotton and to the proceeds thereof be decreed to have vested in him, said William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company.

11. The bankrupts, Knight, Yancey & Company, obtained the moneys of the complainant, Knauth, Nachod 44
& Kuhne, by false pretenses and held the same in trust for their benefit. Said bankrupts also held the entire fund or bank credit including said moneys subject to a trust or charge for their benefit. Said bankrupts then disbursed said entire fund or bank credit, including the moneys of said Knauth, Nachod & Kuhne, in the purchase and redemption of certain cotton and then held the cotton thus purchased and redeemed subject to a trust or charge for the benefit of said Knauth, Nachod & Kuhne. To the extent of said Ninety-eight thousand five and 58/100 dollars ($98,005.58) and interest thereon from April 18, 1910, said cotton and the proceeds thereof equitably belongs to said Knauth, Nachod & Kuhne. 45
The defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company stands merely in the place and stead of said bankrupts. Said Trustee has acquired or claims all of said cotton thus purchased and redeemed. The complainants, Knauth, Nachod & Kuhne, duly rescinded and do hereby again rescind the purchase of said foreign drafts and pretended bills of lading and have duly demanded and do hereby again demand that said bankrupts and said Trustee account for said moneys of said Knauth, Nachod & Kuhne, amounting to Ninety-eight thousand five and 58/100 dollars ($98,005.58) and for the cotton purchased and redeemed

46 therewith and for the cotton purchased and redeemed with the fund or bank credit, including said moneys and for the proceeds thereof. Said bankrupts and said Trustee have refused said demands. The assets of said bankrupts amount to only about Six hundred thousand dollars ($600,000.) while their liabilities amount to about Five million ninety thousand one hundred seventy-three and 84/100 dollars ($5,090,173.84). The complainants, Knauth, Nachod & Kuhne, have no adequate remedy at law. Neither the defendants Westphalen & Company nor any other creditors of the bankrupts have any right to payment out of the moneys of said Knauth, Nachod & Kuhne or the proceeds thereof.

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FOURTH—NON-PARTIES.

The members of the firm of Knight, Yancey & Company, hereinbefore mentioned, though they may appear to be proper parties, are not made parties to this bill because they are not within the Northern District of Florida, the territorial jurisdiction of the Court.

FIFTH—PRAYER.

The complainants, Knauth, Nachod & Kuhne, hereby consent that the answer filed July 31, 1911, by the defendant, Louisville & Nashville Railroad Company to their original bill of complaint herein, stand as an an-
48 swer to this amended bill and waive an answer under oath or affirmation by any defendant and pray for the determination and decree of the Court, as follows:

1. That the complainants, Knauth, Nachod & Kuhne, have duly rescinded the purchase by them of the foreign drafts and bills of lading hereinbefore set forth; and that the bankrupts, Knight, Yancey & Company, received and held certain remittances of money from New York, including the moneys of said complainants, aggregating the sum of $98,005.58, and held said moneys of said complainants in trust for their benefit and held the entire

remittances of which said moneys were a part subject to 49
a trust or charge for the benefit of said complainants, to the extent of said sum of $98,005.58 and interest thereon from April 18, 1910.

2. That said bankrupts disbursed the moneys of said complainants and the entire fund or bank credit of which said moneys became a part in the purchase and redemption of certain cotton or the bills of lading therefor and then held said cotton or said bills of lading subject to a trust or charge for the benefit of said complainants, to the extent of said sum $98,005.58 and interest thereon from April 18, 1910.

50

3. That Schedule 1 hereto annexed includes certain bales of cotton which, or the bills of lading for which, were purchased and redeemed with the moneys of said complainants and, on proof thereof, what bales or part of the cotton set forth in said schedule were purchased or redeemed with the moneys of said complainants and what bales or part with the fund or bank credit of which the moneys of said complainants became a part; that a trust or charge in favor of said complainants be impressed on the proceeds of the cotton set forth in Schedule 1 hereto annexed, to the extent that said cotton or the bills of lading therefor were purchased or redeemed with the moneys of said complainants or with the fund 51
or bank credit of which said moneys became a part; and that, to the end that said trust or charge be enforced, the defendants pay to said complainants the amount thereof out of the proceeds of said cotton.

4. That the defendant, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, has acquired or claims the cotton which, or the bills of lading for which, was or were purchased and redeemed with the moneys of said complainants and with the fund or bank credit of which the moneys of said complainants were a

52 part; that said defendant render an account of said moneys of said complainants, aggregating the sum of Ninety-eight thousand five and 58/100 dollars ($98,005.58), and set forth a full, true and particular account of all and singular the cotton or other property that was purchased or redeemed therewith and of the cotton or other property that was purchased or redeemed with the fund or bank credit of which said moneys were a part; and that said account set forth the marks of the bales of cotton and what has become of the same and the value of any part thereof set forth in Schedule 1 hereto annexed.

53 5. That this bill of complaint be heard and determined in connection with the bill of complaint of the defendants Westphalen & Company (against the defendant William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company and the defendant Louisville & Nashville Railroad Company) in the late United States Circuit Court for the Northern District of Florida, the bill herein before mentioned.

6. That the complainants, Knauth, Nachod & Kuhne, have such other, further and different relief as justice, equity and the circumstances of the case may require.

REEVES & WATSON,
Solicitors for Complainants,
54 Pensacola, Florida.

BRIESEN & KNAUTH,
Of Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and of Counsel for Complainants.

STATE OF NEW YORK,
County of New York. } ss.:

AREND H. WEINGARDT, being duly sworn, says:

That he is a member of the firm of Knauth, Nachod & Kuhne, the complainants in the foregoing Bill; that the complainants were co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself. That he has heard read the foregoing Bill and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true, except that the membership of said firm is set forth as of the time when the suit was instituted.

AREND H. WEINGARDT.

Sworn to before me this
17th day of April, 1914.

FRANK F. KIRKPATRICK,
Notary Public, New York County.

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## SCHEDULE 1.

Cotton at Pensacola claimed by Westphalen & Company (through Scheuch & Company), the proceeds of which have been received by the Trustee (except the 100 bales marked QHYO, or GHYO, replevied by the Peoples Bank & Trust Company of Selma, Alabama); some of which cotton is subject to a trust or charge in favor of Knauth, Nachod & Kuhne:

| Bales. | Marks. | Original Marks. | Shipper or place of Shipment. |
|---|---|---|---|
| 100 | QLEF | 50 QLEF | Knight, Yancey & Co., Selma. |
| | | 50 QLEF | Thompson & Wallace |
| 59 | | — | |
| 50 | PBRA | 12 PBRA | Knight, Yancey & Co., Selma. |
| | | 38 PBR | Thompson & Wallace |
| | | — | |
| 100 | PINC | 63 PINC | Knight, Yancey & Co , Selma. |
| | | 37 PINC | Thompson & Wallace |
| 100 | QTRI | 25 QTRI | Knight, Yancey & Co., Selma. |
| | | 75 OTRI or QTRI | Thompson & Wallace |
| 100 | QEST or QUST | 25 QEST | Knight, Yancey & Co., Selma. |
| | | 75 QEST | Thompson & Wallace |
| | | — | |
| 100 | QEAU | 25 QEAU | Knight, Yancey & Co., Selma. |
| | | 75 QEAU | Thompson & Wallace |
| | | — | |
| 100 | PNCE | 15 PNCE | Knight, Yancey & Co., Selma. |
| 60 | | 85 PNCE | Knight, Yancey & Co., Mobile. |
| | | — | |
| 100 | PWIT or PNFT or PWTT | 15 PWIT, etc. | Knight, Yancey & Co., Selma. |
| | | 85 PWIT | Knight, Yancey & Co., Mobile. |
| | | — | |
| 100 | QURR or OURR | 15 QURR or OURR | Knight, Yancey & Co., Selma. |
| | | 85 QURR or OURR | Knight, Yancey & Co., Mobile. |
| | | — | |
| 100 | QEQS | 15 QEQS | Knight, Yancey & Co., Selma. |
| | | 85 QEQS | Knight, Yancey & Co., Mobile. |
| | | — | |
| 100 | QTOF | 15 QTOF | Knight, Yancey & Co,, Selma. |
| | | 85 QTOF | Knight, Yancey & Co., Mobile. |

| Bales. | Marks. | Original Marks. | | Shipper or place of Shipment. | |
|---|---|---|---|---|---|
| 100 | PCON | 15 | PCON | Knight, Yancey & Co., Selma. | 61 |
| | | 85 | PCON | Knight, Yancey & Co., Mobile. | |
| 100 | QLLE | 15 | QLLE | Knight, Yancey & Co., Selma. | |
| | | 85 | QLLE | Do. , Mobile. | |
| 100 | QSEI or QSSE | 15 | QSEI or QSEE | Do. , Selma. | |
| | | 85 | QSSE or QSEI | Do. , Mobile. | |
| 100 | QRDA | 15 | QRDA | Do. , Selma. | |
| | | 85 | QRDA | Do. , Mobile. | |
| 100 | PGFA or PFGA | 25 | PGFA or PFGA | Knight, Yancey & Co., Decatur. | 62 |
| | | 75 | PGFA or PFGA | C. Gunter Elmore. | |
| 100 | POMP | 25 | POMP | Knight, Yancey & Co., Selma. | |
| | | 75 | POMP | Thompson & Wallace (?) | |
| 100 | PLIA | 25 | PLIA | Knight, Yancey & Co., Selma. | |
| | | 75 | PLIA | Thompson & Wallace. | |
| 100 | QHYO or GHYO | 75 | QHYO or GHYO | Knight, Yancey & Co., Selma. | |
| | | 25 | QHYO or GHYO | Thompson & Wallace. | |
| 100 | RHER | 25 | RHER | Knight, Yancey & Co., Selma. | |
| | | 75 | RHER | Thompson & Wallace. | 63 |
| 1950 | | | | | |

Filed April 20, 1914.

64 **Lovell's Answer and Motion to Dismiss.**

IN THE DISTRICT COURT OF THE UNITED STATES

THE NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD *et al.*, Complainants, vs. 65 MAURICE E. A. WESTPHALEN *et al.*, Defendants. | In Equity. |

Answer and motion of William S. Lovell, as Trustee, of the estate of Knight, Yancey & Company.

Answering the bill as amended but not waiving the motion and plea hereinafter interposed the defendant, William S. Lovell, as Trustee in bankruptcy of the estate of Knight, Yancey & Company, says:

1. Answering the first and second subdivisions of paragraph first this respondent says that the names, residences, etc., of the parties are correctly therein given; 66 hence he admits the averments of said first paragraph.

2. Answering the first subdivision of the second paragraph this respondent says that the averments thereof are true.

The averments of the second subdivision of the second paragraph are true except as hereinafter denied and qualified. The suit of Knauth, Nachod & Kuhne therein referred to was not instituted until after the cotton which was claimed both by the Trustee in bankruptcy of Knight, Yancey & Company and Westphalen & Company, had been sold. The proceeds of such cotton were,

by the agreement of the parties to the litigation involving 67
it, held to abide solely the result of such litigation. Neither Westphalen & Company or any member of said firm, nor said trustee in bankruptcy of Knight, Yancey & Company resided within the jurisdiction of this court at the time of the institution of said suit of Knauth, Nachod & Kuhne, nor were the objects of said suit of Knauth, Nachod & Kuhne in any wise germane to the purposes of the suit of Westphalen & Company against said Lovell as Trustee, nor did the Circuit Court of the United States in which said suit of Knauth, Nachod & Kuhne was instituted have any jurisdiction over the person of necessary defendants thereto, namely, Westphalen & Company and said Lovell, Trustee, nor was there any 68
*res* in the custody of such Circuit Court or being administered thereby. It is denied that the proceeds of said cotton remain on deposit in the First National Bank of Pensacola, Florida, and the American National Bank of Pensacola, Florida, or either of them.

Answering the third subdivision of the second paragraph this respondent says that the complainants, Knauth, Nachod & Kuhne, regardless of what they assert, have no interest in the cotton claimed by Westphalen & Company and by said Lovell as trustee or in the proceeds thereof. As before stated no property was within the district at the time the suit was instituted, the situs of the bank deposit referred to in the bill being at the residence 69
of the person in whose name such deposit was made; nor had the Circuit Court of the United States, in which the suit of complainants was instituted, ever impounded the alleged subject matter of this suit.

So that this respondent says that this court had not nor has it any jurisdiction to hear and determine the asserted claim of complainants to the bank deposit referred to in the bill.

3. The averments in the first subdivision of the third paragraph of the bill are admitted.

This respondent has no knowledge of the averments of

70 fact contained in the second, third, fourth and fifth subdivisions of paragraph three of the bill hence the averments thereof are denied. The transactions therein referred to in so far as they involve the obtaining of money by Knight, Yancey & Company by fraud, the essential elements of which was the issuance by them of forged or pretended bills of lading of carriers correspond to a system of frauds carried on by said Knight, Yancey & Company through a long period of years to-wit five years. As a result of such frauds certain banks and foreign purchasers of cotton suffered losses of approximately five million dollars which constitute practically all the claims against their bankrupt estate, so that if complainants
71 suffered the losses which they aver they did suffer, their losses are not different in kind from those of substantially all of the other creditors of said bankrupt estate.

So far as the averments in the subdivisions last referred to as well as in subdivision six in said paragraph three, to the effect that Knight, Yancey & Company deposited the drafts on Van Gerpen together with the foreign exchange therein referred to for collection, are concerned, this respondent says it is wholly immaterial whether such drafts and foreign exchange were deposited for collection or were forthwith discounted by the bank at Decatur. It appears from the averments of the bill and if it does not such is nevertheless the fact that prior
72 to the deposit with the Decatur bank of said drafts and foreign exchange or contemporaneously therewith Knight, Yancey & Company obtained from said Decatur bank the approximate amount of such drafts on Van Gerpen and used the same in the purchase of cotton or for other purposes; so that when such foreign exchange was sold in New York and the proceeds thereof remitted such proceeds necessarily went to reimburse said Decatur bank and never became subject to the control or disposition of Knight, Yancey & Company; so that furthermore it would be impossible for the money of the person or bank in New York, which went to purchase said drafts, to be the same money as that Knight, Yancey & Company had pre-

viously used in the purchase of cotton, or to have identity 73
with the money of such purchase.

Answering the averments of the seventh subdivision of the third paragraph of the bill, the averments thereof are wholly untrue and have no foundation whatever in fact. As will appear from the averments of the third subdivision of the third paragraph of the bill it is averred that the draft drawn by the bankrupts with forged bill of lading thereto attached were dated from the 8th to 11th of April, 1910; and all of the cotton claimed both by Westphalen & Company and Lovell, Trustee, and referred to in the schedules to the bill was purchased and paid for by the bankrupts at intervals between March 9, 1910 and March 26, 1910 prior to the time that com- 74
plainants suffered the losses which they alleged they suffered no lien or charge of any sort, kind or description rested on such cotton so that it was impossible, whether the complainants suffered the losses referred to by them or not, and whether the money alleged to have been obtained from them by fraud was used by the bankrupts in the purchase of cotton, it was not used and could not have been used in the purchase of the cotton referred to in the schedules to the bill. None of complainant's money was used in the redemption of any of said cotton whatever may be meant by the charge in the bill that the complainants money was used in the purchase and redemption of certain cotton. Moreover re- 75
spondent says that if complainants' money had been used in the purchase of certain cotton that before complainants would be entitled to establish a charge thereon or subject such cotton to the reimbursement of them for their losses, it would be necessary for complainants to identify the cotton into which their money went, and as appears from the averments of said seventh subdivision of said third paragraph they do not attempt to do this but merely aver that their money was disbursed in the purchase and redemption of certain cotton "including a part of the cotton or the bills of lading therefor set

76 forth in schedule one hereto annexed." This respondent expressly denies that the cotton referred to in schedule one includes any cotton or the bills of lading therefor that was purchased or redeemed with the moneys of Knauth, Nachod & Kuhne. This respondent further denies that the proceeds of the cotton set forth in schedule one remain on deposit at Pensacola, Florida and denies that the proceeds of the cotton referred to are the proceeds of money obtained by false pretenses from complainants.

The averments of the 8th subdivision of the third paragraph are admitted.

With reference to the averments in the ninth subdivision of the third paragraph of the bill the conclu-
77 sions of law therein drawn are at variance with the law as declared by the Circuit Court of Appeals of this Circuit in the case of Lovell, Trustee *v.* Isadore Newman & Son, which involved an identical state of facts with that involved in the controversy between said Lovell, Trustee, and said Westphalen & Company, with reference to the cotton involved in this bill. Under the decision in that case as applied to the facts of this case title to the cotton referred to in the bill would be in Westphalen & Company and not in said Lovell, Trustee, hence this respondent deems it unnecessary to discuss the conclusions of law referred to in said ninth subdivision.

The averments of the 10th subdivision of said para-
78 graph three are admitted.

The averments of the eleventh subdivision of the third paragraph are expressly denied. This respondent has no knowledge as to whether or not the bankrupts obtained the money of complainants by fraud, the conclusions of law therein set forth, if it be necessary for respondent to answer the [same], are denied and this respondent says since it appears from the averments of said eleventh subdivision in connection with the averments of the balance of the bill that the money which complainants charge they were defrauded of did not come into the hands of the trustee in bankruptcy and did not remain

with Knight, Yancey & Company but was disbursed by 79
them in the purchase of property which complainants are unable to identify that complainants are not entitled to any charge or lien on any larger mass of property. It is true that the assets of the bankrupt estate only amount to about six hundred thousand dollars as charged in the bill, while the liabilities thereof are more than five million dollars. The assets consist of the remnants of property left as the residuum of the frauds systematically carried on by the bankrupts through a period of years. Neither the money of complainants nor of any one else can be traced therein and this respondent says that such assets of said bankrupt estate should be equally and ratably distributed among those who suffered in like 80
way as a result of the frauds of Knight, Yancey & Company, no one of such persons so suffering being entitled on any legal theory or pretense to any priority of payment over any other.

4. Answering the fourth paragraph of the bill the averments thereof are admitted except the conclusion that the bankrupts are not necessary parties to the case.

This respondent says that the bill is insufficient in point of law, and moves the court to dismiss the same on the following grounds:

1. The bill, regarded as a bill of intervention is not 81
in subordination to and in recognition of the propriety of the suit of Westphalen & Company against the respondent as Trustee in Bankruptcy of Knight, Yancey & Company, *et al.*

2. The purposes of the bill, regarded as a bill of intervention are not germane to those of the suit of Westphalen & Company against the respondent as Trustee in the bankruptcy of Knight, Yancey & Company, *et al.*

3. The bill may not be maintained as an original bill because at the time this suit was brought there was no

82 personal jurisdiction of the court over the defendants, Westphalen, and the respondent; nor was the property the subject matter of the suit within the court's jurisdiction, or in its custody.

4. Complainants show no right, title or interest in any of the property the subject matter of the suit, nor any right to personal relief against any defendant.

5. It does not appear that the money of the complainants ever passed into the custody or control of the bankrupts or was ever disbursed by them in the purchase of cotton but on the contrary it appears that such money
83 went to reimburse the First National Bank of Decatur or other Decatur bank for advances made by them to Knight, Yancey & Company with which advances the cotton referred to in the bill was purchased.

6. It does not appear with sufficient certainty that the money of complainants ever passed into the control of or became subject to the disposition of the bankrupts.

7. It affirmatively appears from the bill that the money of the complainants did not pass into the hands of the Trustee in bankruptcy but that such money was disbursed by the bankrupts or at their instance in the
84 purchase or redemption of cotton and the cotton so purchased or redeemed is not identified but on the contrary it appears that such cotton was merely a part of a larger mass, so that complainants would not be entitled to maintain the bill.

8. Because the bill is vague, uncertain and contradictory in its averments as to whether or not the money which was used in the purchase or redemption of the cotton referred to in the bill was money advanced to the bankrupts by the First National Bank of Decatur or other Decatur bank prior to the time that complainants parted with their money or whether the money of com-

plainants passed into the custody of the bankrupts free of any right on the part of such bank to retain the same. 85

9. The bill is without equity.

10. And for matter in abatement this respondent says that this bill ought not to be maintained because prior to the institution of this suit the cotton therein referred to, constituting the subject matter of the suit of Westphalen & Company against this respondent, had, by agreement, between Westphalen & Company and this respondent, as such Trustee been sold and the proceeds thereof deposited in banks at Pensacola, Florida to abide the result of the litigation between Westphalen & Company and this respondent and for no other purpose; that neither such cotton nor the proceeds thereof were ever impounded nor in any sense in the custody of the Circuit Court of the United States in which the bill of complainants against this respondent and others was filed; that none of the property referred to in the bill was within the jurisdiction of the court at the time the suit was brought; that the bank deposits referred to, so far as the suits thereof is concerned, followed the residence of the depositors which was not within the jurisdiction of this court; that Maurice E. A. Westphalen and Mme. McLeod Westphalen were at the time of the institution of this suit and still are residents of France and that said William S. Lovell was at the time of the institution of this suit and still is a resident of the State of Alabama; that none of the bankrupts at the time of the institution of this suit resided, nor have they since resided within the jurisdiction of this court; and that the administration of the bankrupt estate of Knight, Yancey & Company was at the time of the institution of this suit and is now pending in the Northern District of Alabama and that neither the said Westphalen nor this respondent have been served or can properly be served with process to answer the bill. 86 87

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for William S. Lovell,
Trustee in Bankruptcy of Knight,
Yancey & Company.

88 STATE OF ALABAMA:
Jefferson County:

WILLIAM S. LOVELL being duly sworn deposes and says that the statements of fact contained in the paragraph immediately foregoing are true.

WILLIAM S. LOVELL.

Subscribed and sworn to before me this the 20th day of August 1914.

ANNIE L. PEACE,
Notary Public.

Filed August 22, 1914.

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## Westphalen & Co.'s Motion to Dismiss.

IN THE DISTRICT COURT OF THE UNITED STATES,

THE NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD, *et al.*, Complainants, vs. 90 MAURICE E. A. WESTPHALEN, *et al.*, Defendants. | In Equity. |

Maurice E. A. Westphalen and Madame McLeod Westphalen *in commendam,* copartners as Westphalen & Company, two of the defendants to the amended bill of complaint herein filed, appearing for the special purpose and no other, until the question herein raised is decided move the Court to dismiss the said amended bill on the following grounds:—

1. The bill regarded as a bill of intervention is not in subordination to and in recognition of the propriety

of the suit of these respondents against the defendant Lovell, Trustee in Bankruptcy of Knight Yancey & Company; 91

2. The purposes of the bill, regarded as a bill of intervention, are not germane to those of the suit of these respondents against the defendant Lovell as Trustee as aforesaid;

3. The bill may not be maintained as an original bill because at the time this suit was brought there was no personal jurisdiction of the Court over these respondents, and the defendant Lovell as Trustee as aforesaid, nor was the property the subject matter of the suit within the Court's jurisdiction or in its custody; 92

4. Complainants show no right, title or interest to any of the property the subject matter of the suit, nor any right to personal relief against any defendant;

5. It does not appear that the money of the complainants ever passed into the custody or control of the bankrupts or was ever disbursed by them in the purchase of cotton but on the contrary it appears that such money went to reimburse the First National Bank of Decatur or other Decatur Bank for advances made by them to Knight, Yancey & Company with which advance the cotton referred to in the bill was purchased; 93

6. It does not appear with sufficient certainty that the money of complainants ever passed into the control of or became subject to the disposition of the bankrupts;

7. It affirmatively appears from the bill that the money of the complainants did not pass into the hands of the Trustee in bankruptcy but that such money was disbursed by the bankrupts or at their instance in the purchase or redemption of cotton and the cotton so purchased or redeemed is not identified but on the contrary it appears that such cotton was merely a part of a larger mass, so

94 that complainants would not be entitled to maintain the bill;

8. Because the bill is vague, uncertain and contradictory in its averments as to whether or not the money which was used in the purchase or redemption of the cotton referred to in the bill was money advanced to the bankrupts by the First National Bank of Decatur or other Decatur Bank prior to the time that complainants parted with their money or whether the money of complainants passed into the custody of the bankrupts free of any right on the part of such bank to retain the same.

95 9. The bill is without equity.

10. And for matter in abatement the said Lovell, Trustee, says that this bill ought not to be maintained because prior to the institution of this suit the cotton therein referred to, constituting the subject matter of the suit of Westphalen & Company against the said Lovell, Trustee, had, by agreement, between Westphalen & Company and the said Lovell, Trustee, been sold and the proceeds thereof deposited in banks at Pensacola, Florida to abide the result of the litigation between Westphalen & Company and this respondent and for no other purpose; that neither such cotton nor the proceeds thereof were
96 ever impounded nor in any sense in the custody of the Circuit Court of the United States in which the bill of complainants by these respondents was filed; that none of the property referred to in the bill was within the jurisdiction of the court at the time the suit was brought; that the bank deposits referred to, so far as the situs thereof is concerned, followed the residence of the depositors which was not within the jurisdiction of this court; that Maurice E. A. Westphalen and Mme. McLeod Westphalen were at the time of the institution of this suit and still are residents of France and that said William S. Lovell was at the time of the institution of this suit and still is a resident of the State of Alabama; that

none of the bankrupts at the time of the institution of this suit resided, nor have they since resided within the jurisdiction of this court; and that the administration of the bankrupt estate of Knight, Yancey & Company was at the time of the institution of this suit and is now pending in the Northern District of Alabama and that neither the said Westphalens nor the said Lovell, Trustee have been served or can properly be served with process to answer the bill. 97

E. C. MAXWELL,
Solicitor for said defendants.

Filed August 22, 1914.

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## Complainants' Objections to Motions.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

99

The complainants, Knauth, Nachod & Kuhne, object to the motion of the defendant Lovell as Trustee, to dismiss the amended bill of the complainants, and to the motion of the defendants Westphalen, to dismiss the amended bill of the complainants. Without waiving

100 other grounds of objection, the complainants specify the following objections to each of said motions:

1. So far as either of said motions is based both on a want of jurisdiction and a want of equity, said grounds are repugnant and exclusive. A motion to dismiss for want of jurisdiction admits the cause of action alleged in the amended bill and errors or defects, if any, must be disregarded, because they are curable by amendment (Rules 19 and 28, Present Equity Rules) and because to predicate a want of jurisdiction is to predicate a want of power to pass on the merits of the amended bill. A motion to dismiss for want of equity admits jurisdiction and asks the Court to pass on the merits of the amended
101 bill.

2. The Court has already determined that it has jurisdiction (upon defendants' motions to quash service of process and to dismiss the original bill of complaint) and is not authorized to review its own decisions in that regard.

3. None of the defendants has a right to have his or their motion to dismiss, on the ground of a want of equity, called up and disposed of before final hearing. None of them has answered the amended bill, except the defendant Lovell as Trustee, or waived his or their right to
102 answer the same or conceded the claim of the complainants (except for the purpose of his or their motion) and the Court is not in a position to exercise a discretion under Rule 29 of the present Equity Rules to allow either of said motions to be called up and disposed of before final hearing. Said discretion should be exercised, complainants submit, only in case the controlling facts in the case are conceded for all purposes, either by answer or otherwise, so that a disposal of the points of law presented will be necessary and will, in effect, finally dispose of the whole or a material part of the cause of action, whether in favor of complainants or defendants.

4. The application to dismiss the amended bill, for want of jurisdiction, is in effect an application to have the government of the United States, acting through its judicial department, deprive the complainants of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States. The construction and application of the constitutional inhibition was involved in the original proceedings set forth in the amended bill of complainants, as well as in this case. The relief sought in said original proceedings gave the Court exclusive jurisdiction and that carried with it the jurisdiction and duty to hear and determine and enforce the rights of all claimants of the property impounded and sequestered. To disclaim said ancillary jurisdiction or duty is to violate said constitutional inhibition. 103 104

5. The grounds, on which each of said motions is made, are not in accord with the allegations of the amended bill and are untenable in point of law.

Dated April 14, 1915.

WATSON & PASCO,
Solicitors for Complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y. 105

W. H. WATSON,
Of solicitors and counsel for Complainants.

Filed July 10, 1915.

106 **Order of Dismissal.**

IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE, WILHELM KNAUTH, AUGUST STERN, OSCAR L. GUBELMAN, AREND H. WEINGARDT, ROLLIN C. NEWTON, MARY W. KNAUTH, and PERCIVAL KUHNE, partners as Knauth, Nachod &
107 Kuhne,
Complainants,

vs.

MAURICE E. A. WESTPHALEN, MME. McLEOD WESTPHALEN (the latter *in commendam*), composing the firm of Westphalen & Company; and WILLIAM S. LOVELL, as Trustee in Bankruptcy of the estate of Knight, Yancey & Company; and Louisville & Nashville Railroad Company,
Defendants.

In Equity.

108 The above styled and entitled cause coming on for hearing on the motions filed by the defendants, Wm. S. Lovell, as Trustee in Bankruptcy, and Westphalen & Company to dismiss the amended bill of complaint, and on the objections of the complainant to said motions, and same having been argued by counsel for the respective parties,

It is ordered that the objections to said motions be and are overruled.

And the Court having considered said motions to dismiss and the said amended bill, and being of the opinion that this court is without jurisdiction of the subject matter of the litigation, and that the proper forum for the

relief sought by the complainant is the bankruptcy court 109
of the Northern District of Alabama, it is therefore ordered that said amended bill be and it is hereby dismissed at the cost of the complainants.

Done and ordered at Pensacola, Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Filed July 10, 1915.

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## Assignment of Errors.

110

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

111

The complainants, Knauth, Nachod & Kuhne, being about to ask for the allowance of an appeal to the Supreme Court of the United States from the order or decree of this Court made and entered herein on or about the 10th day of July, 1915, hereby make the following assignment of errors in the said order and in the proceedings of the Court:

1. The District Court erred in dismissing the amended bill of complaint of the complainants, Knauth, Nachod & Kuhne. It had impounded and taken possession of

property which equitably belonged to said complainants and holds the proceeds thereof.

Its jurisdiction is exclusive of all other tribunals. The said complainants are entitled to have their claim to said property and its proceeds heard and determined herein and the said order or decree, dismissing their bill for want of jurisdiction, deprives them of their property without due process of law, in contravention of Amendment V and other provisions of the Constitution of the United States.

2. The District Court erred in holding that the property in question is *in custodia legis* of the bankruptcy court for the Northern District of Alabama. Said bankruptcy court has never had possession or jurisdiction thereof. Said property had been transferred by the bankrupts and was held adversely to their Receivers and to their Trustee. The conditions on which said transfer is voidable must be established and the transfer must be set aside before said bankruptcy court will have any jurisdiction of the same.

3. The District Court erred in holding the law against the complainants, Knauth, Nachod & Kuhne. The order or decree dismissing the amended bill of said complainants is contrary to the facts admitted in the cause and contrary to law and contrary to equity.

WATSON & PASCO,
Solicitors for complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

Filed July 10, 1915.

## Appeal.

115

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
Defendants.

116

The complainants, Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne (being the survivors of themselves and Friedrich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne) conceive themselves aggrieved by the order or decree made and entered, in the above entitled cause, on the 10th day of July, 1915, and do hereby appeal from said order or decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors which is presented and to be filed herewith. The appeal is taken to said Supreme Court, pursuant to Sec. 238 of The Judicial Code, because the jurisdiction of the above named court is in issue and the case involves the construction and application of the Constitution of the United States and draws in question the constitutionality of certain laws of the United States. That is to say the record presents the question whether the laws authorizing the court to impound and hold the property in question, under the facts and circumstances of the case, are not unconstitutional

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and void unless they also vest it, either expressly or by necessary implication, with jurisdiction to hear and determine the claim of the complainants to said property.

WHEREFORE the said complainants pray that this appeal be allowed; and that a transcript of the record of the proceedings and papers on which said order or decree was made be duly authenticated and sent to the Supreme Court of the United States.

WATSON & PASCO,
Solicitors for Complainants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Complainants,
25 Broad Street,
New York, N. Y.

W. H. WATSON,
Of Solicitors and Counsel.

IT IS ORDERED that the foregoing appeal be and hereby is allowed as prayed for.

Dated this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Filed July 10, 1915.

## Bond on Appeal.

121

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD, MAX JAFFE and others, formerly composing the firm of KNAUTH, NACHOD & KUHNE,
Complainants,

vs.

122

MAURICE E. A. WESTPHALEN and others,
Defendants.

KNOW ALL MEN BY THESE PRESENTS, That Knauth, Nachod & Kuhne, as principal, and NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Maurice E. A. Westphalen, Madam McLeod Westphalen and William S. Lovell as Trustee in Bankruptcy of 123
Knight-Yancey & Company, in the sum of Five Hundred ($500.00) Dollars to be paid to the said obligees, their executors, administrators, successors or assigns, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 6th day of July, 1915.

WHEREAS, the above named Knauth, Nachod & Kuhne, have prosecuted an appeal to the Supreme Court of the

124 United States, to reverse the order or decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the Northern District of Florida,

NOW, THEREFORE, the condition of this obligation is such, that if the above named Knauth, Nachod & Kuhne, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

KNAUTH, NACHOD & KUHNE,
By GEO. T. HOGG, of Counsel.
NATIONAL SURETY COMPANY,
125 By WM. A. THOMPSON,
Resident Vice-President.

Attest:
N. V. TYNAN,
[SEAL] Resident Assistant Secretary.

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AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

STATE OF NEW YORK }
County of New York } ss.:

126 On this 6th day of July one thousand nine hundred and fifteen before me personally came WM. A. THOMPSON, known to me to be the Resident Vice-President of the NATIONAL SURETY COMPANY, the corporation described in and which executed the within and foregoing Bond of Knauth, Nachod & Kuhne, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said NATIONAL SURETY COMPANY, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the

Act of Congress of August 13th, 1894; that the seal 127
affixed to the within Bond of Knauth, Nachod & Kuhne is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said Company; that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable 128
to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Three Million Five Hundred Thousand ($3,500,000.) Dollars.

That R. R. Turnbull, at Pensacola, Florida, is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.

Sworn to, acknowledged before me, and subscribed in my presence this 6th day of July, 1915.

P. P. MARCONE,
[SEAL] Notary Public, &c., No. 2380.

Approved July 10, 1915. 129

WM. B. SHEPPARD, District Judge.

Filed July 10, 1915.

130 **Citation.**

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
131 Defendants.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To Maurice E. A. Westphalen and Madam McLeod Westphalen (the latter *in commendam*) composing the firm of Westphalen & Company; and William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company—GREETING:

YOU ARE HEREBY CITED and admonished to be and
132 appear in the Supreme Court of the United States, at the City of Washington in the District of Columbia, thirty days after the date of this citation (pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Northern District of Florida, wherein Max Jaffe, Wilhelm Knauth, August Stern, Oscar L. Gubelman, Arend H. Weingardt, Rollin C. Newton, Mary W. Knauth and Percival Kuhne, being the survivors of themselves and Friedrich Nachod, deceased, and with him formerly composing the firm of Knauth, Nachod & Kuhne, are appellants and you are appellees) to show cause, if any there be, why the order

or decree rendered against said appellants, as in said 133
appeal mentioned, should not be reversed and why speedy justice should not be done the parties in that behalf.

WITNESS Hon. WILLIAM B. SHEPPARD, Judge of the District Court of the United States for the Northern District of Florida, this 10th day of July, 1915.

WM. B. SHEPPARD,
District Judge.

Service for W. S. Lovell accepted this July 10, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for Lovell. 134

Service on behalf of Maurice E. A. Westphalen and Mme. McLeod Westphalen, composing Westphalen & Company, is accepted this July 10, 1915.

E. C. MAXWELL,
Solicitor for said defendants.

Filed July 10, 1915.

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## Præcipe on Appeal.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

| | |
|---|---|
| FRIEDRICH NACHOD and others, Complainants, AGAINST MAURICE E. A. WESTPHALEN and others, Defendants. | In Equity, No. 100. (Of former Circuit Court Docket.) |

137

Pursuant to rules 75-76 of the present Equity Rules, the complainants Knauth, Nachod & Kuhne hereby indicate the following as the papers to be incorporated in the transcript of record on their appeal to the Supreme Court of the United States from the decree herein of July 10, 1915, to wit:

1. The amended bill of complaint.

2. The answer and motion to dismiss said bill by the defendant Lovell, as Trustee.

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3. The written motion to dismiss said bill by the defendants composing the firm of Westphalen and Company.

4. The written objections by complainants to said motions.

5. The decree dismissing said bill.

6. The assignment of errors.

7. The appeal and the allowance thereof. 139

8. The bond on appeal.

9. The citation on appeal.

WATSON & PASCO,
Solicitors for Appellants,
Pensacola, Florida.

BRIESEN & KNAUTH,
Counsel for Appellants,
25 Broad Street, New York, N. Y.

W. H. WATSON,
Of Counsel. 140

Due service of a copy of the foregoing *præcipe* is admitted this 28th day of July, 1915.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors and of Counsel for defendant William S. Lovell, as Trustee, etc.
E. C. MAXWELL,
Solicitors and of Counsel for the defendants, members of the firm of Westphalen & Company. 141

Filed July 28, 1915.

142

## Order of Enlargement.

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FREIDRICH NACHOD and others,
Complainants,

AGAINST

MAURICE E. A. WESTPHALEN and others,
143 Defendants.

This cause came on to [illegible] heard at this time and was submitted by [illegible] complainants; and thereupon, upon cons[illegible]eof, it was ordered, adjudged and decreed [illegible]llowing, viz.:

That the time for certification and filing of the transcript of the record upon the appeal herein, allowed July 10, 1915, be and the same hereby is extended for the period of thirty days from August 9, 1915.

Dated August 9, 1915.

144 WM. B. SHEPPARD,
District Judge.

We hereby consent to the above order.

PERCY, BENNERS & BURR,
BLOUNT & BLOUNT & CARTER,
Solicitors for defendant Lovell as Trustee etc.
E. C. MAXWELL,
Solicitor for defendants Westphalen.

Filed August 9, 1915.

## Further Order of Enlargement.

145

IN THE DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA.

FRIEDRICH NACHOD *et al.*,
Complainants,

vs.

MAURICE E. A. WESTPHALEN *et al.*,
Defendants.

146

This cause came on to be further heard at this time, and was submitted by counsel for complainant, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as following, to wit:

That the time for certification and filing of the transcript of the record upon the appeal herein, allowed July 10, 1915, be, and the same is hereby, extended for the period of thirty days from September 6, 1915.

Dated September 4th, 1915.

WM. B. SHEPPARD,
District Judge.

147

We hereby consent to the above order.

BLOUNT & BLOUNT & CARTER,
Solicitors for Defendant Lovell,
as Trustee, etc.
E. C. MAXWELL,
Solicitors for Defendants Westphalen.

148 **Authentication of Records.**

UNITED STATES DISTRICT COURT,
Northern District of Florida, } ss.:

I, FREDERICK W. MARSH, Clerk of said Court, do hereby certify that the foregoing is a true and correct transcript of the papers mentioned in the *præcipe* of the complainants in the cause in equity therein set forth and constitute the record and proceedings of this court on the appeal to the Supreme Court of the United States in said cause, no *præcipe* having been filed by any of the defendants, and no opinion in writing having been ren-
149 dered by the District Judge on granting the motions to dismiss; and that said record remains on file in said cause in my office as Clerk of said Court.

IN WITNESS WHEREOF I do hereto set my hand and affix the seal of said court at the City of Pensacola, Florida, this 6th day of September, 1915.

FREDERICK W. MARSH,
Clerk.

[L. S.]

150

# Supreme Court of the United States.

OCTOBER TERM, 1914. No.

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WILHELM KNAUTH, OSCAR L. GUBELMAN, ROLLIN C. NEWTON, MARY W. KNAUTH, MAX JAFFE, AUGUST STERN, AREND H. WEINGARDT and PERCIVAL KUHNE, as survivors of themselves and FRIEDRICH NACHOD, deceased, formerly composing the firm of KNAUTH, NACHOD & KUHNE,

*Petitioners,*

*against*

EDMOND LATHAM, CHARLES LATHAM and RAOUL LATHAM, composing the firm of LATHAM & COMPANY; AMERICAN SURETY COMPANY OF NEW YORK; WILLIAM S. LOVELL, as Trustee in Bankruptcy of KNIGHT, YANCEY & COMPANY; and CLARENCE E. FROST and WILLIAM S. LOVELL, as Receivers in Bankruptcy of KNIGHT, YANCEY & COMPANY,

*Respondents.*

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TO THE ABOVE NAMED COURT:

The petition of the petitioners above named, by Arthur von Briesen, Antonio Knauth, Thomas M. Stevens and George T. Hogg their counsel, respectfully represents:

1. On or about April 29, 1910, the respondents, Clarence E. Frost and William S. Lovell, as re-

ceivers in Bankruptcy of Knight, Yancey & Company, together with a creditor of said firm, filed their bill in equity in the United States Circuit Court for the Southern District of Alabama against the respondents, Latham & Company and others. The claim was that Knight, Yancey & Company had illegally transferred some 7800 bales of cotton to the respondents Latham & Company. The relief sought was that said transfer be set aside and the property delivered to the complainants and that, pending the hearing and determination of the suit, the property be impounded and sequestered by the Court. Thereafter and on or about May 4, 1910, a writ of sequestration was issued and some 4200 bales of said cotton were seized and held by the Marshal.

2. Thereafter, and on or about May 5, 1910, the complainants amended said bill as follows:

"NEW ALLEGATIONS.

"4-1/2. Your orators are informed and believe and on such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of any such right, title or interest claimed in and to said seventy-eight hundred (7800) bales of cotton is unknown to these complainants."

NEW PRAYER.

"That all persons, firms or corporations who claim any right, title or interest in and to said seventy-eight hundred (7800) bales of cotton be made parties defendants to this bill and be cited by publication to answer this bill."

3. Thereafter and on or about May 14, 1910, the respondents Latham & Company were permitted by a decree of said court to withdraw said cotton and substitute in place thereof a forthcoming bond. Said bond was furnished by the respondents Latham & Company and American Surety Company of New York and, after it had been filed, the property was delivered to said Latham & Company.

4. Being thus called upon to do so, the petitioners, Knauth, Nachod & Kuhne, duly appeared in said suit and filed their answer, on or about July 1, 1910. By permission of the court they also filed a cross-bill (or whatever it should be called). By their said bill, the petitioners claimed that the bankrupts had obtained from them the sum of $98,005.58, by false representations, perpetrated by means of forged bills of lading; that certain bales of the cotton impounded and sequestered by the court were the proceeds of said money; and that Latham & Company were not takers either for value or without notice or in good faith. The relief sought was, in substance, that the property and the forthcoming bond, constituting the proceeds thereof in the possession of the court, be impressed with a trust or charge for the benefit of the petitioners. Said bill was of an original as well as of an auxiliary and ancillary character and jurisdiction was predicated on the ground that the said court had acquired exclusive dominion over and possession of the *res* and that this carried with it the jurisdiction and duty to hear and determine the rights of the petitioners, Knauth, Nachod & Kuhne.

5. Thereafter and on or about August 20, 1910, the respondent, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, was substituted in place of the original complainants and

permitted to file a supplemental bill. Thereafter and on or about December 20, 1910, said Knauth, Nachod & Kuhne were permitted to file an amended bill.

6. Thereafter and on or about March 21, 1911, a decree was made upon motion striking out the answer and bills of the petitioners, Knauth, Nachod & Kuhne, for want of jurisdiction, without regard to whether the question should have been presented by demurrer instead of by motion. In its opinion the court indicated that the petitioners' remedy was to present a claim to the bankruptcy court for any proceeds that the Trustee might recover. But this ignores the fact that the petitioners' claim is of a prior and paramount character and not dependent on the claim of the Trustee. Thereafter and on or about December 3, 1912, said decree was reversed by the United States Circuit Court of Appeals for the Fifth Circuit. (*Knauth, Nachod & Kuhne* vs. *Lovell et al.*, 200 Fed. Rep. 403, 404.)

7. Thereafter the respondents above named moved to dismiss the petitioners' bill, the grounds being briefly a want of jurisdiction and a want of equity. The district court, having succeeded the circuit court, heard said motions on the theory that they were authorized by the present Equity Rules and that the reversal of the previous decree rested on the fact that it had been stricken out on motion instead of dismissed on demurrer. The motions were granted, the court then indicating in its opinion that the petitioners' remedy was to follow the cotton to France. But this ignores the fact that the court had substituted a forthcoming bond therefor and that said bond constituted the proceeds thereof, the same as if the property had been sold and the money deposited in court.

8. Thereafter and on or about January 18, 1915, the decree dismissing the bill of the petitioners, Knauth, Nachod & Kuhne, was modified and affirmed and thereafter and on or about February 22, 1915, a petition for a rehearing was denied by the United States Circuit Court of Appeals for the Fifth Circuit and thereupon an assignment of errors was duly filed by the petitioners above named. Said Circuit Court of Appeals indicated in its opinion, as had the former circuit court on the first motion to strike out, that the petitioners' remedy was to present a claim to the bankruptcy court for any proceeds that the Trustee might recover. But, as above stated, this ignores the fact that the petitioners' claim is of a prior and paramount character and not dependent on the claim of the Trustee. It was expressly assumed by both of said courts on each motion and each appeal that, under the allegations of their bill, the petitioners could follow their money into the property impounded and sequestered by the court. The Circuit and District Courts held, however, that they were without jurisdiction to permit the petitioners to follow their money into said property and, on the last appeal, that ruling was affirmed. Three months have not elapsed since the entry of said judgment of affirmance.

9. The petitioners above named feel aggrieved and believe that the decree of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous and that this Court should require said case to be certified to it for its review and determination, in conformity with the provisions of the Acts of Congress in such cases made and provided.

WHEREFORE, the petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Cir-

cuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled *Knauth, Nachod & Kuhne, Appellants,* vs. *Latham & Company and others, appellees,* No. 2651, to the end that the said case may be reviewed by this court as provided in § 240 of the Federal Judicial Code, being the Act of Congress approved March 3, 1911, and § 4 of the Act of Congress amending the said Code, approved January 28, 1915; and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the said case be reversed, so far as the same affirms the decree dismissing the so called cross-bill of Knauth, Nachod & Kuhne, and that the case be then remitted to the United States District Court for the Southern District of Alabama to hear and determine the claim of said Knauth, Nachod & Kuhne upon the merits; and that the petitioners have such other, further and different relief as justice may require, in conformity with the law and procedure of the United States.

Dated March 31, 1915.

KNAUTH, NACHOD & KUHNE,
*Petitioners.*

ARTHUR V. BRIESEN,
*Counsel for Petitioners,*
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG.
*Of Counsel.*

STATE OF NEW YORK, }
County of New York. } ss:

I, GEORGE T. HOGG, being duly sworn, say.:

I am one of counsel for the petitioners named in the foregoing petition and have prepared the same and am the counsel most familiar with the details of the matter; and that the allegations thereof are true as I verily believe.

GEORGE T. HOGG.

Sworn to before me this 31st }
day of March, 1915. }

FRED A. KLEIN,
Notary Public, Richmond County.
Certificate filed in New York County.

## Motion for Certiorari.

SUPREME COURT OF THE UNITED STATES.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*

*against*

LATHAM & COMPANY and others,
*Respondents.*

The petitioners appear, by Arthur von Briesen, Antonio Knauth, Thomas M. Stevens and George T. Hogg their counsel, and move the Court for the issue of a writ of *certiorari* or other proper process, directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said court to certify to this court for its review and determination a certain cause, lately pending in said Court of Appeals, wherein the petitioners were appellants and the respondents were appellees, No. 2651; and, to that end, it tenders its petition and brief with a certified copy of the entire record in said cause in said Court of Appeals.

Briefly stated, the petitioners claim that the bankrupts, in whose place the respondents stand, obtained from petitioners the sum of $98,005.58 by false representations, perpetrated by means of forged bills of lading; that said money was converted into certain cotton, which was transferred by the bankrupts to the respondents Latham & Company; that, at the instance of the Receivers and a creditor of the bankrupts, said property was impounded and sequestered by the court; that the pe-

titioners were then called upon to present their claim to said property; that the Trustee was then substituted, in place of said receivers and creditor; that said property was then delivered to Latham & Company, upon their filing a forthcoming bond in place thereof; that the petitioners, being thus called upon to do so, presented their claim to said property; that the forthcoming bond in the possession of the court constituted the proceeds of said property, the same as if it had been sold and the proceeds deposited; that the jurisdiction of the court was exclusive and carried with it the jurisdiction and duty to hear and determine and enforce the claim of the petitioners; but that the petitioners' claim was then dismissed for want of jurisdiction and that the petitioners have thus been deprived of their property, without a hearing upon the merits and without due process of law.

The petitioners assume that this court will consider only the question of jurisdiction of the District Court to hear and determine and enforce the claim of the petitioners and, upon that assumption, concede that the question will not require extended argument and will consent, if *certiorari* be granted, that the cause be transferred to the summary docket for hearing as soon as a return can be made and printed.

ARTHUR V. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

## Notice of Motion.

SUPREME COURT OF THE UNITED STATES.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*

*against*

LATHAM & COMPANY, and others,
*Respondents.*

WALKER B. SPENCER, CHARLES PAYNE FENNER, PHILIP S. GIDIERE, and ESMOND PHELPS, Counsel for respondents, Latham & Company and American Surety Company of New York.

AUGUSTUS BENNERS, Counsel for the respondents Trustee and Receivers.

PLEASE TAKE NOTICE that, on the petition of Knauth, Nachod & Kuhne, verified March 31, 1915, and a copy of the entire record in the cause, the foregoing motion will be submitted to the Supreme Court of the United States at Washington, D. C., on the 19th day of April, 1915, at the opening of the court on that day or as soon thereafter as counsel can be heard; and that, in support of said motion and petition, a brief of which the annexed is a copy will be submitted to the court.

Dated March 31, 1915.

ARTHUR v. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

# Supreme Court of the United States,

OCTOBER TERM, 1914, No.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*

*vs.*

LATHAM & COMPANY and others,
*Respondents.*

## BRIEF FOR PETITIONERS.

Petition by the petitioners, the members of the firm of Knauth, Nachod & Kuhne, for the issue of a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit.

### POINT I.

**The property in question was not the property of the bankrupts and was not brought *in custodia legis* by the adjudication of bankruptcy. It had been transferred by the bankrupts to the respondents, Latham & Company, before bankruptcy. The conditions, on which said transfer is voidable, must be established and the transfer must be set aside before the property can become an asset of the bankrupt estate or be subject to the jurisdiction of the bankruptcy court.**

*Bankruptcy Act, §§ 60b, 67e, 70a (5), 70e.*

*Babbitt* vs. *Dutcher*, *216, U. S. 102, 113*, and cases cited.

*Hebert* vs. *Crawford*, *228 U. S. 204, 209-210.*

*In re Rathman*, *183 Fed. Rep. 913, 927.* Cited in *Jones* vs. *Springer*, *226 U. S. 148, 155.*

In the case of *Lazarus* vs. *Prentice* (234 U. S. 263, 266), from which the Circuit Court of Appeals quoted, the lien in question was for attorneys' fees and it had been created after the commencement of bankruptcy proceedings and the appointment of a receiver and after ancillary proceedings had been instituted, for the extension of the receivership to the district where the property was located, and the property was seized in the possession of the bankrupts and their agents. In that case the jurisdiction of the bankruptcy court was exclusive because it had first attached. In this case the jurisdiction of the former circuit court was exclusive because it, and not that of the bankruptcy court, had attached.

## POINT II.

**The petitioners were not deprived of the right to follow their money into the property in question by the bankruptcy of Knight, Yancey & Company. Said right continued and the Trustee took subject thereto.**

*Eyster* vs. *Gaff*, *91 U. S. 521, 525.*

*Jaquith* vs. *Rowley*, *188 U. S. 620, 623-624, 625-626.*

*First Nat. Bank of Chicago* vs. *Chicago Title & Trust Co.*, *198 U. S. 280, 289, 291.*

*Hiscock* vs. *Varick Bank of New York, 206 U. S. 28, 41.*

*In re Rathman, 183 Fed Rep. 913, 925–928; 106 C. C. A. 253.* Cited in *Jones* vs. *Springer.* (226 U. S. 148, 155).

*Skilton* vs. *Coddington, 185 N. Y. 80, 85.*

*Reed* vs. *Bullington, 49 Miss. 223, 225.*

## POINT III.

**The original suit was not merely to set aside a preferential transfer, as assumed by the Circuit Court of Appeals. It was also a suit to recover possession of the property itself and, in the meantime, to impound and sequester it. The distinction is material because the relief sought necessitated an exclusive dominion over the property and this carried with it the jurisdiction and duty to hear and determine the claim of the petitioners.**

*Krippendorf* vs. *Hyde, 110 U. S. 276, 280, 282, 287.*

*Morgan's La. and Tex. R. R. and Steamship Co.* vs. *Tex. Cent. Ry. Co., 137 U. S. 171, 201.*

*Farmers Loan & Trust Co.* vs. *Lake Street Elevated R. R. Co., 177 U. S. 51, 61.*

*Murphy* vs. *John Hoffman Co., 211 U. S. 562, 569.*

*Palmer* vs. *Texas, 212 U. S. 118, 129.*

*Rickey Land and Cattle Co.* vs. *Miller & Lux, 218 U. S. 258, 262-263.*
*Hebert* vs. *Crawford, 228 U. S. 204, 207-208, 210.*

Possession also gave the court a right to sell and deposit the proceeds or, what is the same thing, to substitute a forthcoming bond therefor. The delivery of the property, on the deposit of its value or a bond therefor, transferred the claims of all parties to the deposit or bond as the proceeds of the property.

*Jones* vs. *Springer, 226 U. S. 148, 155, 157.*
*First Nat. Bank of Chicago* vs. *Chicago Title & Trust Co., 198 U. S. 280, 291.*

The remedy suggested by the Circuit Court of Appeals, that the petitioners can present a claim to the bankruptcy court is inadequate. The claim of the petitioners is prior and paramount to those of both the Trustee and Latham & Company. It is not subject to the conditions which attach to the claim of the Trustee. It is based on the fact that the property in question is the proceeds of their money and that Latham & Company were not innocent purchasers for value. (*Petition for Certiorari*, ¶4.)

## POINT IV.

### The right of the petitioners to follow their money into the property in question is well settled.

On the first appeal the Circuit Court of Appeals summarized the petitioners' bill as follows:

"The amended cross-bill sets up that Knight, Yancey & Co. obtained from the ap-

pellants $98,005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit."

*Knauth, Nachod & Kuhne* vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

The petitioners rely on a long line of authorities among which are the following:

*3 Pom. Eq. Juris. (3d Ed.) §§ 1044, 1048, 1051, 1053, 1058.*

*Gorman* vs. *Littlefield, 229 U. S. 19, 24-25;* and cases cited.

*Hurley* vs. *Atchison, T. & S. F. Ry. Co. 213 U. S. 126, 134.*

*Oliver* vs. *Piatt, 3 How. 333, 401, 409, 410.*

*Butler* vs. *Western German Bank, 159 Fed. Rep. 116, 117; 86 C. C. A. 306.*

*Smith* vs. *Township of Au Gres, Mich., 150 Fed. Rep. 257, 260; 80 C. C. A. 145.*

*Lightfoot* vs. *Davis, 198 N. Y. 261, 270-273, 274; and cases cited.*

*Welch* vs. *Polley, 177 N. Y. 117, 121, 122, 123.*

*Muller* vs. *Kling, 209 N. Y. 239, 244, 245*

## POINT V.

**The petitioners have been deprived of their property without due process of law.**

*U. S. Cons't'n, Amd't V.*

*Chicago, B. & Q. R. R. Co.* vs. *Chicago, 166 U. S. 226, 233-234, 234-235.*

*State of Washington ex Rel. O. R. R. and N. Co.* vs. *Fairchild, 224 U. S. 510, 523-524.*

This necessarily follows from the fact that the property of the petitioners was impounded and sequestered and subjected to the exclusive jurisdiction of the Court; that the petitioners were called upon, as unknown claimants, to present their claim to said property; that the petitioners did present their claim; and that the claim of the petitioners was then dismissed without a hearing on the merits. Did the District Court have that power? "The question is to be determined not by what has been done under it in any particular instance, but what may be done under and by virtue of its authority."

*Colon* vs. *Lisk, 153 N. Y. 188, 194.*

*Gilman* vs. *Tucker, 128 N. Y. 190, 200.*

*Stuart* vs. *Palmer, 74 N. Y. 183, 188.*

The constitutional question was involved in the motions to dismiss for want of jurisdiction and raised by the first error assigned in the District Court. This was the way to raise it, under the present practice.

## POINT VI.

**The petitioners were duly admitted to the suit and permitted to file their bill. They were then entitled to have their claim heard and determined on the merits, whether they might have been refused admittance or not.**

*In re Mich. Cent. R. R. Co. 124 Fed. Rep. 727, 730; 59 C. C. A. 643.*

*Ill. Steel Co.* vs. *Ramsey, 176 Fed. Rep. 853, 863, 866; 100 C. C. A. 323.*

*Gay* vs. *Hudson River Electric Co., 184 Fed. Rep. 689, 692-693; 106 C. C. A. 643.*

## POINT VII.

**The writ of *certiorari* should be granted.**

Respectfully submitted March 31, 1915.

ARTHUR V. BRIESEN,
*Counsel for Petitioners,*
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

# Supreme Court of the United States

No. [redacted] 98

KNAUTH, NACHOD & KUHNE,

Petitioners,

*versus*

LATHAM & COMPANY, AND OTHERS,

Respondents.

BRIEF ON BEHALF OF LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS, ON APPLICATION FOR WRIT OF CERTIORARI.

WALKER B. SPENCER,
CHAS. PAYNE FENNER,
*For Latham & Company and American Surety Company.*

Hayman Printing Co., "The Legal Printers," 730 Pophras St., N. O., La.

# Supreme Court of the United States

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*No.* ——.

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KNAUTH, NACHOD & KUHNE,

Petitioners,

*versus*

LATHAM & COMPANY, AND OTHERS,

Respondents.

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## BRIEF ON BEHALF OF LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS, ON APPLICATION FOR WRIT OF CERTIORARI.

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This case comes here on an application for *certiorari* by Knauth, Nachod & Kuhne to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit, sustaining a motion on behalf of Latham & Company, American Surety Company and William S. Lovell, Trustee in Bankruptcy, to dismiss the cross-bills, or bills of intervention of the appellants filed by them in a suit brought by William S. Lovell, Trustee in Bankruptcy, of Knight, Yancey & Company against Latham & Company.

## BRIEF STATEMENT OF THE PROCEEDINGS.

Knight, Yancey & Company, large dealers in spot cotton in Decatur, Alabama, having become seriously embarrassed, involuntary bankruptcy proceedings were filed against them in the Northern District of Alabama, and William S. Lovell and Clarence E. Frost were appointed temporary receivers. Alleging that Latham & Company, a cotton firm, domiciled and doing business in Havre, France, had, by delivery to them of a large amount of cotton, received an unfair preference from Knight, Yancey & Company, Frost and Lovell filed their bill in the Southern District of Alabama against that firm to recover about forty-two hundred (4,200) bales of cotton, then in process of shipment by Knight, Yancey & Company to Latham & Company, and at that time located on a steamship wharf in the City of Mobile. The receivers' bill was subsequently amended by adding an allegation, on information and belief, that there were other persons than Latham & Company who claimed some right, title and interest in the cotton in question, and praying that all persons, firms or corporations who claimed any right, title or interest in and to said forty-two hundred (4,200) bales of cotton be made party defendants to the bill and be cited by publication to answer the bill.

After obtaining the leave of court to that effect, the petitioners, presumably in pursuance of the invitation so extended, filed an answer and also what they denominated a cross-bill, or bill of intervention. To this bill Latham & Company and the American Surety Company filed demurrers, and William S. Lovell filed a motion to strike from the files. Before hearing was had on these matters, the petitioners filed an amended cross-bill and thereafter the matter

coming on to be heard on a motion of William S. Lovell, trustee, to strike said amended cross-bill from the files, the District Court so ordered. Thereafter an appeal was taken by Knauth, Nachod & Kuhne to the appellate court, and it was here held that the procedure adopted to secure the dismissal of the cross-bill was not the proper procedure, and that the appellees should have proceeded by demurrer or motion to dismiss.

(See opinion on former appeal, 200 *Federal Reporter*, 403).

The cause having been remanded to the District Court for further proceedings, Latham & Company, the American Surety Company, and William S. Lovell, trustee, then filed motions to dismiss the cross-bill and amended cross-bill of the appellants, and upon hearing, the District Court sustained the motions and dismissed the bills. From that decree the present appeal is prosecuted.

## BRIEF STATEMENT OF CASE MADE BY THE AMENDED CROSS-BILL.

It will be unnecessary to consider the original cross-bill filed by petitioners, as all of its allegations are embodied in the expansive amended cross-bill. This amended cross-bill, the Court will find, teems with irrelevant and redundant and utterly vague allegations, and justly merited the criticism of the Court of Appeals of New York, which had occasion, in the case of *Jeffe vs. Weld*, 102 N. E. 1104, to pass upon its counter-part filed by the petitioners in that case, that Court saying that the bill was "prolix to a degree not easy to characterize."

Stripped of its mass of redundant and irrelevant allegations, the essential facts alleged by the amended cross-bill may be stated as follows:

1. The petitioners were bankers doing business in New York, and particularly were so engaged during the period from the 5th to the 18th of April, 1910, and were, as a part of their business, in the habit of buying foreign bills of exchange drawn on persons in Europe against sale and shipments of cotton.

2. That during said period, from the 5th to the 18th day of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York some thirteen drafts, or foreign bills of exchange, to which were attached thirteen export bills of lading purporting to show that thirteen hundred bales of cotton had been shipped by Knight, Yancey & Company for transportation to several European ports. These drafts were drawn to the order of Knight, Yancey & Company, and the cotton mentioned in the bills of lading was to be delivered to the order of Knight, Yancey & Company, and the insurance certificates attached were payable, in case of loss, to Knight, Yancey & Company, and all of these documents were endorsed in blank by Knight, Yancey & Company.

3. That these drafts, bills of lading and insurance certificates were forwarded to an agent of Knight, Yancey & Company in New York for the purpose of selling same to the petitioners or other bankers, as genuine and valid documents, when in fact they were not, and thereby to obtain money of the petitioners or other bankers on the strength thereof.

4. That the petitioners were misled and deceived, and believing that said documents were genuine, purchased same, and delivered to said agent of Knight, Yancey & Company the sum of $98,005.58, and said agent received said money in that capacity, and delivered same, after possibly deducting his commission, to Knight, Yancey & Company.

5. That, as a matter of fact, said bills of lading were forgeries perpetrated by John W. Knight, or some other person. No cotton was ever delivered on said bills of lading, and the drafts drawn against them were not accepted or paid, and were duly protested.

6. That the method in which these drafts and documents were handled by Knight, Yancey & Company was as follows:

The bills of lading were forged by John W. Knight, or some other person acting for the firm, and were delivered by said firm to the First National Bank of Decatur, Alabama, for the purpose of forwarding the same to New York for sale. To these forged bills of lading were attached foreign bills of exchange and insurance documents, and at the time of delivery of these bills of lading and drafts to the First National Bank of Decatur, for the purpose aforesaid, a domestic or currency draft was drawn by Knight, Yancey & Company on their agent or broker in New York, for the approximate sum of the foreign bills of exchange in United States currency, and this domestic draft was deposited with said bank, and by it placed to the credit of said firm. As collateral security to insure the acceptance and payment of the domestic drafts, the bank took other collateral security, ample for its protection against non-acceptance or non-payment of said domestic drafts.

7. That the thirteen foreign bills of exchange purchased by the petitioners were all deposited with the First National Bank of Decatur for transmission as aforesaid to New York between the 5th and 18th days of April, 1910, and were purchased by the petitioners from F. Van Gerpen, acting as agent of Knight, Yancey & Company, and after Van Gerpen had obtained from petitioners the price of said sale, he accepted and paid the domestic drafts for approximately the aggregate face amount of said thirteen foreign bills of exchange, and accounted for the proceeds thereof, and remitted same to Knight, Yancey & Company, and by them same was deposited, together with other monies of their own, with the First National Bank of Decatur, or other bank, except as some part of the proceeds may have remained in the hands of Van Gerpen, and afterwards paid over to receivers or trustee in bankruptcy.

8. That Knight, Yancey & Company, having deposited the money of petitioners, with other monies of their own, in the First National Bank of Decatur, or other depositaries, held their entire bank credit or account receivable thus created for the account and in trust for the petitioners, at least to the amount of petitioners' money thus deposited.

9. That at the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, said bank credit was expended (except so far as the same may have remained on hand at the date of bankruptcy, as set forth in Schedule 17 annexed to the bill) for certain cotton, and in the creation of certain credits with brokers called deposits for the purchase of cotton. Some of the said brokers' credits were redeemed in whole or in part, and the money again deposited with the First National Bank of Decatur and again reunited;

and some of said bank credits, brokers' credits and other credits representing said trust fund were outstanding at the time of adjudication in bankruptcy, and were subsequently collected by the receivers and the trustee. Certain of the cotton paid for out of said trust fund, or the proceeds thereof, came into the hands of the receivers and trustee, and the estate in bankruptcy has thus been enriched by the money of petitioners, and the receivers and trustee hold all such cotton, or the proceeds thereof, and all such credits, or the proceeds thereof, in trust for the benefit of petitioners to the extent of $98,005.58.

10. That petitioners are not able to specify all of the cotton paid for out of their money, or all the money or bank and brokers' credits subject to a trust in their favor, but annex to their bill twenty-one (21) schedules, showing some fifteen or sixteen thousand bales of cotton purchased with their money, and several hundred thousand dollars of monies and credits likewise created and showing also seventy-six hundred and four (7,604) bales of cotton purchased with trust funds in the possession of the trustee, at the time the cross-bill was filed, together with one hundred and two thousand nine hundred and sixty-four and 22/100 dollars ($102,964.22) of cash, the proceeds of other cotton and credits belonging to said trust fund collected by the trustee.

11. That all of said cotton and monies which they allege were partly in the hands of the trustee, and partly in the hands of other persons (some of whom even were not parties to this suit), were chargeable with a trust in their favor.

12. That the forty-two hundred (4,200) bales of cotton received by Latham & Company, and which were the sub-

ject-matter of the suit between Lovell, trustee, and Latham & Company, were received by Latham & Company as an unfair preference from Knight, Yancey & Company, and the transaction was void as to petitioners.

13. The prayer for relief is as follows:

(*a*) That it be decreed that the sum of $98,005.58 belonging to petitioners was received by Knight, Yancey & Company, between the 5th and 18th days of April, 1910, and was held by them as the money of petitioners;

(*b*) That Knight, Yancey & Company, and the trustee in bankruptcy, render an account for said money, and set forth a true account of all cotton or other property purchased, either in whole or in part, with their said money, and render a true account of the disposition made of said cotton; a true account of what part of said cotton, or the proceeds thereof, came into the hands of the trustee;

(*c*) That the transfer of Knight, Yancey & Company to Latham & Company of the cotton in question, or of any other property purchased in whole or in part with the money of petitioners, be decreed invalid and void as to them;

(*d*) That it be decreed that Knight, Yancey & Company, and Lovell, trustee, held all such cotton, monies and credits in trust for their benefit, and that it be impressed with a lien to the amount of $98,005.58, and that the Court enforce the execution of said trust by Latham & Company and the American Surety Company, their surety, and by the receivers and trustee, out of the property in their hands;

(*e*) That they have such other relief as may be proper.

## POINTS MADE BY RESPONDEN

As additional reasons to those given by the
of Appeals for the affirmance of the judgmei
trict Court, and as showing that the affirmance
ment was correct, we submit the following:

I.

The bill on its face shows that the monies used in the purchase of Latham & Company's cotton were not the monies of the petitioners.

II.

In so far as the bill attempts to charge a trust on the cotton of Latham & Company, it does not trace with sufficient certainty petitioner's money into that cotton to justify a Court in Equity in impressing same with a trust in their favor.

III.

The bill on its face shows that no equitable relief against Latham & Company can be granted, for the reason that the facts alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.

## ARGUMENT.

In the argument which follows, we shall contend that, from whatever aspect the allegations of the bill are considered, no equity is shown in said bill against Latham & Company and the American Surety Company, and that being true, it should be dismissed as to all of the respondents. We shall first discuss the allegations of the bill from the standpoint that its averments affirmatively show that the peti-

tioner's money was not used in purchasing the cotton which is the subject-matter of this suit; and then from the standpoint that the allegations of the bill show that the plaintiffs are unable to say with that degree of certainty which the law requires, that their money, or any part thereof, went into this specific cotton; and lastly, from the standpoint that, even if the Court can eke out of the allegations sufficient to say that the petitioners' money, or a part thereof, did go into this cotton, yet in such a case it affirmatively appears from the petitioners' allegations that their money is still in the hands of the trustee, and they can have, in that event, no relief against the other appellees.

## FIRST POINT.

**The bill on its face shows that the monies used in the purchase of the cotton belonging to Latham & Company, the subject-matter of this suit, were not the monies of the petitioners.**

For the purpose of the argument on this point, we shall re-state in a brief form the essential **affirmative** allegations made by the petitioners in their amended cross-bill, which we contend show on the face of the bill that it was not the petitioners' monies that were used in the purchase of the cotton involved in this suit. They are as follows:

(1) Between April 5th and 18th, 1910, Knight, Yancey & Company caused to be issued and sent to New York for sale thirteen foreign bills of exchange, to which were attached thirteen fraudulent bills of lading purporting to evidence shipments of thirteen hundred bales of cotton to foreign ports. (Cross-bill, paragraph 9; Trans., page 81.)

(2) The said thirteen foreign bills of exchange and said thirteen forged bills of lading were delivered by Knight, Yancey & Company to the First National Bank of Decatur **for the purpose of having same forwarded by that bank to a broker in New York for sale** to the plaintiff or some other banker. (Cross-bill, paragraph 11; Trans., page 83.)

(3) Said drafts were so forwarded to one Van Gerpen, a broker in New York. (Cross-bill, paragraph 9; Trans., page 81.)

(4) At the same time said foreign bills of exchange and forged bills of lading were delivered for the purpose aforesaid by Knight, Yancey & Company to the First National Bank of Decatur, a domestic or currency draft was drawn by Knight, Yancey & Company on Van Gerpen in New York for the approximate aggregate amount of said foreign drafts. (Cross-bill, paragraph 12; Trans., page 84.)

(5) Said domestic drafts on Van Gerpen were deposited in the First National Bank of Decatur to the account of Knight, Yancey & Company and the proceeds thereof were placed to the credit of Knight, Yancey & Company. (Cross-bill, paragraph 12; Trans., page 84.)

(6) To insure the redemption of said domestic drafts on Van Gerpen in case of non-acceptance or non-payment, the First National Bank of Decatur took collateral other than said foreign bills of exchange and forged bills of lading, ample to protect them in such an event. (Cross-bill, paragraph 12; Trans., page 84.)

(7) Van Gerpen sold said thirteen foreign bills of exchange, with said thirteen forged bills of lading attached, to the petitioners, and after receiving payment therefor from

the petitioners, accepted and paid the domestic draft drawn on him by Knight, Yancey & Company out of the monies so received from the petitioners. (Cross-bill, paragraph 12; Trans., pages 84 and 85.)

(8) The proceeds of said thirteen foreign bills of exchange were accounted for and remitted to Knight, Yancey & Company by Van Gerpen after deducting his commission and payments, and were by them deposited, with other monies of their own, in the First National Bank of Decatur. (Cross-bill, paragraph 12; Trans., page 85.)

(9) That the monies so obtained and so mingled with other monies of Knight, Yancey & Company were used by them in the purchase of all or some of the cotton mentioned in the twenty-one schedules attached to the bill, which cotton was, at the filing of the suit, in the hands of Latham & Company, the trustee in bankruptcy, and the various other persons mentioned in the bill. (Cross-bill, paragraph 14; Trans., page 85.)

All of the foregoing facts are contained in affirmative allegations made in the bill, and on this statement of facts we claim that it is clear that the funds **actually** used by Knight, Yancey & Company in the purchase of the cotton involved in this case (assuming that any part of it was so purchased) were the funds of the First National Bank of Decatur, obtained by Knight, Yancey & Company by the discount or deposit of the domestic drafts on Van Gerpen, and were not the funds of the plaintiff.

In this connection, it should be noted:

(*a*) The proceeds of the domestic or currency drafts drawn by Knight, Yancey & Company on Van Gerpen were

immediately placed to the credit of the account of Knight, Yancey & Company in the First National Bank of Decatur, and were then checked against by Knight, Yancey & Company to buy this cotton;

(*b*) The thirteen foreign bills of exchange, with the thirteen forged bills of lading attached, were not attached to the domestic drafts on Van Gerpen as collateral, or otherwise. On the contrary, the bill alleges that the bank took other collateral from Knight, Yancey & Company to secure the acceptance and payment by Van Gerpen of the domestic drafts drawn on him;

(*c*) The foreign bills of exchange, with the forged bills of lading attached, were deposited with the First National Bank of Decatur merely to be forwarded by it to Van Gerpen. The First National Bank of Decatur did not buy or discount these foreign bills of exchange or give Knight, Yancey & Company any credit therefor, or thereon, or have any interest therein or relation thereto other than as forwarding agent. The drafts discounted by the bank, and upon which Knight, Yancey & Company obtained money to buy cotton, were the domestic or currency drafts drawn on Van Gerpen, the acceptance and payment of which were secured by other collateral deposited with the bank by Knight, Yancey & Company.

(*d*) Had Van Gerpen refused to accept or pay the domestic drafts drawn on him by Knight, Yancey & Company and discounted by the First National Bank of Decatur, the First National Bank of Decatur would have had to look to the credit of Knight, Yancey & Company and the other collateral deposited by them with it as security for said domestic drafts;

(*e*) The fact that Van Gerpen used the proceeds of the sale of the foreign bills of exchange to obtain money whereby to pay the domestic drafts and whereby the First National Bank of Decatur was reimbursed for monies loaned or advanced to Knight, Yancey & Company by discount of such domestic drafts, and with which they purchased cotton, does not make the monies petitioners paid Van Gerpen the purchase money of such cotton. To illustrate: If I borrow from a bank $1,000.00 on my ten (10) days' note, secured by United States bonds, and with this money buy cotton or other property which I deliver in payment of an antecedent debt, and thereafter to pay my note at maturity, I sell a fraudulent bill of lading to another for $1,000.00 and take these proceeds and pay my note at the bank, it cannot be said that such other person's money was the purchase money of the cotton or other property, so as to impress that property with a trust in his favor as against the person who received it.

(*f*) The money paid by petitioners to Van Gerpen, and used by him to pay the domestic drafts for account of the First National Bank of Decatur did not, after such payment, belong to Knight, Yancey & Company, but to the First National Bank of Decatur, and if such money had been lost in transit, the loss would have been the bank's loss.

We think it is plain, therefore, that from the allegations of the bill it affirmatively appears that it was the money of the First National Bank of Decatur and not the money of the petitioners that was used to purchase the cotton involved in this suit.

In the case of *Jeffe vs. Weld*, in the State courts of New York, the petitioners made in that case exactly the same contentions by a bill of intervention (the counterpart in its alle-

gations of their cross-bill in this case) that they are making here, and the Supreme Court of New York sustained the contention which we are now making.

*Jeffe vs. Weld*, 132 N. Y. Supp. 505, affirmed by Appellate Division, 139 N. Y. Supp. 1101, affirmed by the Court of Appeals, 102 N. E. 1104.

The Appellate Division, in affirming the decree of the lower Court dismissing the petitioners' bill of intervention, said:

> "It does not appear from the allegations of the amended complaint that the cotton which so came into the hands of the defendants was purchased with the plaintiff's money. In fact, it was purchased with money which had been on deposit to the credit of Steele, Miller & Company in their Mississippi banks. That money, or a part of it, had been credited by the banks by reason of the currency drafts deposited and which were afterwards paid by Van Gerpen with plaintiff's money. The deposit of the currency drafts was not made for collection, but for the purpose of being immediately credited to the account of Steele, Miller & Company, as in fact it was. * * * The amount thus credited was not the amount paid by the plaintiff, but it was the proceeds of the currency drafts, and for the acceptance and payment of which the banks had taken security from Steele, Miller & Company. The fact that the currency drafts were accepted and paid by Van Gerpen with monies fraudulently obtained from the plaintiffs by reason of other drafts and forged bills of lading, did not, for the reasons above given, enable them to have a trust impressed upon the cotton because the same had not been purchased with their money."

The petitioners in their brief, seeming to think that the question has some bearing here, attempt to avoid the force of this argument by suggesting that "this argument is based on the hypothesis that when the deposit of the currency draft of Knight, Yancey & Company on Van Gerpen was made, it operated as an outright purchase by the bank." In this respect, they entirely misconceive the point which we make.

It is perfectly immaterial in this case whether the bank or Knight, Yancey & Company had **legal title** to these currency drafts after they had been deposited in the bank to account of Knight, Yancey & Company and they had been credited with the proceeds thereof. The question is not one of **title,** but is, whose money was it that Knight, Yancey & Company drew out of the bank on the strength of the deposit of the currency drafts, and used in the purchase of cotton, the bank's or the petitioners'?

It is immaterial to the determination of this question whether the bank purchased the drafts and placed the purchase price to Knight, Yancey & Company's credit, and thereby became the legal owner of the drafts, or whether the bank merely accepted the drafts for collection, leaving Knight, Yancey & Company the legal owners. For the fact still remains that the bank did then and there **loan** or **advance** or **pay** Knight, Yancey & Company a certain sum of money on the strength of either the domestic drafts or the other collateral deposited specially by them to guarantee the payment of the drafts. It makes no difference which, so far as concerns the validity of our argument. And it was that particular money, so obtained by them from the bank as a loan, advance, or payment, whichever one may choose to call it, which the cross-bill alleges Knight, Yancey & Company

used to pay for this cotton. That money was undoubtedly the bank's money. Nor is the situation altered by the fact that Knight, Yancey & Company, by an independent transaction of sale betwen them, represented by Van Gerpen, and the petitioners, thereafter obtained a sum of money which they used either to repay a loan or advance made to them by the bank on a different account, to wit: a currency draft on Van Gerpen or that the bank reimbursed itself for the purchase price paid for the currency draft by receiving payment from Van Gerpen out of the monies obtained by him from petitioners.

Let us suppose this case: Kinght, Yancey & Company deposited a currency draft on Van Gerpen with the bank and deposited certain stocks as security thereto. The bank then placed to their credit the amount of the draft, which they immediately withdrew and used to buy cotton, which they delivered on contract to a third person. At the same time they delivered certain foreign bills of exchange, to which were attached certain bills of lading, to the bank, with instructions to forward same to Van Gerpen. The bank's function with reference to these foreign bills was merely that of forwarding agent. It had no other relation towards these documents, nor any interest in them. Van Gerpen received the foreign bills and sold them to petitioners; received from them the money; but instead of paying the currency draft misappropriated the money, or otherwise misappplied it, and the currency draft was returned unpaid. Whose money is it, which was previously drawn out of the bank and used to buy the cotton that was lost, if Knight, Yancey & Company and their collateral failed to make good? Unquestionably, the bank's.

The cases cited by petitioners have no bearing on the question here presented. The cases of *Richardson vs. Louisville Banking Company*, 94 Fed. 442, and *Beal vs. City*, 50 Fed. 647, and the other cases cited, involve merely the question of **title or ownership as between the bank and the depositor** of a draft deposited in the ordinary course of business without any special understanding or agreement as to whether it was purchased by the bank or taken by it for collection. In all of these cases, the banks had not paid or advanced the depositor anything on account of the draft deposited, and in none of them was the question, whether or not monies paid, advanced, loaned or credited on account of the drafts were the bank's money, in any way involved, and these cases, we submit, are not authority in the instant case.

## SECOND POINT.

**The bill does not trace with legal certainty petitioners' money into the Latham cotton so as to justify a court of equity in impressing same with a trust in their favor.**

In order to subject specific property, and especially specific property in the possession of a third person, to a trust in their favor, petitioners must trace definitely and certainly the trust funds into the specific property sought to be charged. A mere inference or suggestion on their part that their money was so used is not sufficient, and vague and general allegations that their money was used in the purchase of either the cotton claimed by Latham & Company, or that claimed by Westphalen & Company (who were not parties to the suit), or that claimed by the other persons mentioned (who were not parties to the suit), or that found in the hands of the trustee when bankruptcy was declared, and which show that the petitioners cannot, with that certainty required

by the law, point out the specific property purchased with their money, do not state a cause of action.

The authorities to this effect are so numerous and so unanimous that we content ourselves with a citation of some of the most apposite.

*Litchfield vs. Ballou*, 114 U. S. at 195.
*Randolph vs. Allen*, 73 Fed. 39-40.
*Ferris vs. Van Vechten*, 73 N. Y. 113.
*Phillips vs. Overfield*, 13 S. W. 705.
*Ober vs. Cochran*, 45 S. E. 384.
*Parker vs. Jones*, 67 Ala. 234.
*Ardis vs. Smith*, 52 Ga. 102.
*Oliver vs. Platt*, 3 How. 401-402.
*Peters vs. Baine*, 133 U. S. 670.
*Metropolitan Bank vs. Campbell*, 77 Fed. 705.
*Empire vs. Carroll*, 194 Fed. 604.
*Jeffe vs. Weld*, 132 N. Y. Supl. 505; and 39 Cyc. 530, 551.

An examination of the allegations of the bill shows on its face that the petitioners cannot trace their money with the required certainty into the Latham cotton. A reading of the 14th, 15th, 16th and 17th paragraphs of their amended cross-bill (Trans., pages 85-89) will show their utter uncertainty as to whether their monies were used in the purchase of the Latham cotton in Mobile, or the Latham cotton in Pensacola, or the Westphalen cotton in Pensacola, or the Ingelfingen cotton in New Orleans, or the large amount of cotton that came into the trustee's hands from the possession of the bankrupts, or whether it formed a part of the monies deposited by Knight, Yancey & Company with a dozen or more banks and brokers, or formed a

part of the monies that were found in possession of the bankrupts at the time of their bankruptcy. And, finally, having designated every bale of cotton purchased by Knight, Yancey & Company after April 5, 1910, every bank or broker's credit opened by them after that date, and every payment made by them, as having been purchased or made out of their monies, all of which property they described in twenty-one (21) schedules covering twenty-six (26) pages of the printed transcript, they conclude the 20th paragraph of their cross-bill with the statement:

> "The schedules hereto annexed are made part hereof, but they are not exclusive, and your orators, Knauth, Nachod & Kuhne, will ask leave to follow their money into any assets that may have come into the hands of the receivers or trustee. They also submit that any assets in the hands of the trustee should be applied to the reimbursement of their $98,005.58, first of all, whether their money be traced into the same or not."

This is the same bill concerning which the New York Court of Appeals, in the case of *Jeffe vs. Weld*, 102 N. E. 1104, **sustaining the point we now make,** made these observations:

> "There can be no doubt of the rule that funds obtained by fraud may be followed through however many transmutations of form they may have passed, so long as the rights of a third party for value and in good faith do not intervene; but this complaint, though prolix to a degree not easy to characterize, is so replete with hypothetical and alternative allegations that it is not possible on any reasonable interpretation to spell out any direct allegation that the money obtained from these plaintiffs did in fact pass into the cotton upon which it is sought to impress a trust."

## THIRD POINT.

**The cross-bill on its face shows that no equitable relief against these respondents can be granted for the reason that the facts affirmatively alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.**

We base our contention on this point upon the well-settled principle that when trust funds have been mingled with the private funds of a trustee and payments have been made out of such mingled funds, the presumption is that the trustee paid out of his own private funds, if sufficient funds are found in his hands to satisfy the trust funds.

*Empire vs. Carroll*, 194 Fed. 604-605.
39 Cyc. 539, and authorities there cited.
3rd Pomeroy, Eq. Jurisprudence, Section 1049, pages 2021-2022.

The rule is thus stated by Pomeroy:

> "When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the Court that he has withdrawn his own money and left the trust fund; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust fund."

If, therefore, the cross-bill shows by its affirmative allegations, that there are in the hands of Knight, Yancey & Company, or in the hands of their trustee in bankruptcy, of these alleged mingled funds or of cotton, sufficient to satisfy the claims of the petitioners, then the presumption is that the funds or property so remaining in the hands of Knight,

Yancey & Company, or their trustee in bankruptcy, are the funds or property of the petitioners. Especially will this presumption be invoked in behalf of a third person, because it is a well-settled principle that a third person should not be disturbed where the trustee or his representative is able to respond, or where the *cestui qui trust* can obtain relief without disturbing the rights of such third person.

*Crutchfield vs. Haynes*, 14 Ala. 49.
*Litchfield vs. Ballou*, 114 U. S. 195.

An examination of the schedule attached to the petitioners' amended cross-bill shows that there are in the hands of the trustee in bankruptcy both cotton and monies, claimed by them to be a part of the trust fund for their benefit, sufficient many times over to satisfy their claim.

The following cotton is alleged to be in the hands of the trustee and to constitute the cotton or a part thereof, purchased with the appellant's money, to wit:

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| Schedule 7 (Trans., page 109) | 965 Bales |
| Schedule 9 (Trans., pages 113-115) | 1,998 Bales |
| Schedule 10 (Trans., page 116) | 306 Bales |
| Schedule 21 (Trans., page 121) | 4,335 Bales |
| Total | 7,064 Bales |
| Schedule 17 (Monies, etc., Trans.— Pages 119-120) | $23,612.06 |
| Schedule 18 (Monies, etc., Trans.— Page 120) | 79,352.16 |
| Total trust monies now held by trustee | $102,964.22 |

In other words, the trustee has remaining in his hands, out of the alleged trust fund, more than six times the number of bales of cotton claimed by the petitioners to be due them, and an amount of cash in excess of their disbursements.

In these circumstances, we submit that a court of equity will not decree a trust against property in the possession of a third person, when it affirmatively appears that a sufficient amount of the trust funds remains in the hands of the trustee to satisfy his claim.

We respectfully submit that the application for the writ should be denied.

WALKER B. SPENCER,
CHAS. PAYNE FENNER,
*For Latham & Company and*
*American Surety Company.*

# Supreme Court of the United States,

OCTOBER TERM, 1914, No. 908.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*

*vs.*

LATHAM & COMPANY and others,
*Respondents.*

## REPLY FOR PETITIONERS.

The petitioners are in receipt, by the courtesy of counsel for respondents Latham & Company and American Surety Company of New York, of a copy of their brief in opposition to the petition for a writ of *certiorari* and respectfully request the Court to consider the following points in connection therewith.

The petition consists of a summary statement of the facts of the case and the motion contains a summary statement of the contentions of the petitioners.

## POINT I.

**The question is whether the petitioners were entitled to have their claim heard and determined on its merits in the courts below and to amend their bill, if found defective. The brief for said respondents is proof positive, the petitioners submit, that their bill is not frivolous, and that the writ of *certiorari* should be granted.**

*Moore-Mansfield Construction Co.* vs. *Electrical Installation Co.*, *234 U. S. 619, 626.*

*Itow and Fushimi* vs. *United States*, *233 U. S. 581, 586.*

"It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

*Rogers* vs. *Alabama*, *192 U. S. 226, 230.*

## POINT II.

**The respondent Trustee disputes that the petitioners have as much right to follow their money into other property in his hands as into the property in question; but, if that were conceded, it would not deprive them of the right to follow their money into the property in question, the respondents Latham & Company not being takers in good faith or for value.** (*Printed Record, pp. 89-90, ¶s. 18-19.*) **The following quotation from petitioners' bill seems sufficient on this point.**

> "* * * after your orators Knauth, Nachod & Kuhne, * * * had delivered their money to said F. van Gerpen * * * said foreign drafts were all accounted for and the proceeds thereof remitted to Knight, Yancey & Company and deposited by them, with other money, in the First National Bank of Decatur * * * . At the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, the said bank credit or trust fund was expended * * * for certain cotton. * * * Parts of the cotton mentioned in all said schedules 5 to 14 inclusive were paid for out of the money of Knauth, Nachod & Kuhne." * * * (*Printed Record on Appeal, pp. 86, 87.*)

## POINT III.

**Judgment on the points submitted on behalf of the respondents, Latham & Company, should be reserved until after the case has been heard on the merits.**

Respectfully submitted April 16, 1915.

ARTHUR V. BRIESEN,
Counsel for Petitioners,
25 Broad Street,
New York, N. Y.

ANTONIO KNAUTH,
THOMAS M. STEVENS,
GEORGE T. HOGG,
Of Counsel.

# Supreme Court of the United States,

OCTOBER TERM, 1915.

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| KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.* | No. 420. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.* | No. 656. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* vs. MAURICE E. A. WESTPHALEN and others, *Appellees.* | No. 657. |

## MOTION.

THE PETITIONERS AND APPELLANTS appear and MOVE for an order (pursuant to the provision of Rules 32, 6, 22 and 26) that these cases be advanced and heard together, on the ground that the only question at issue is "the question of the jurisdiction of the Court below" and that said three

cases involve "the same question". The petitioners and appellants ask that the above cases be advanced for hearing on March 8, 1916, or such other time as the Court shall deem meet.

## STATEMENT.

Briefly stated, the facts and objects of the motion are as follows:

1. The respondents, the Receivers in Bankruptcy of Knight, Yancey & Company, filed a bill in equity in the United States Circuit Court for the Southern District of Alabama and said court thereon sequestered 4200 bales of cotton. (*Transcript of Record in No. 420, pages 19–21.*) The petitioners were then made defendants in said suit, as unknown parties that claimed an interest in said cotton, and called upon to answer said bill, by an amendment thereof. (*T. of R. in No. 420, pages 22–23.*) Said court then permitted the respondents, Latham & Company, to substitute for said cotton a forthcoming bond and, on the filing thereof, directed the Marshal to deliver said cotton to them. (*T. of R. in No. 420, page 29.*) Being thus called upon to do so and the proceeds or substitute for said cotton being *in custodia legis*, the petitioners answered said bill and, by leave of court, filed a cross-bill or whatever it should be called setting forth their interest in said cotton. (*T. of R. in No. 420, pages 33–34, 35, 60, 61–62, 64, 69, 82–83.*) Said Receivers were succeeded by the respondent Trustee. (*T. of R. in No. 420, pages 43–44.*)

> "The amended cross-bill sets up that Knight, Yancey & Co. obtained from the appellants $98,005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit."
>
> *Knauth, Nachod & Kuhne* vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

2. Said Circuit Court subsequently granted a motion to strike out said cross-bill, on the ground that the court had no jurisdiction and that the petitioners' remedy was to present to the bankruptcy court a claim to the pro-

ceeds of said cotton or bond, if any. (*T. of R. in No. 420, pages 103, 104; Lovell* vs. *Latham & Co. et al., 186 Fed. Rep. 602, 603.*) The decree striking out said cross bill was reversed, however, on appeal. (*Knauth, Nachod & Kuhne, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*) Nothing daunted, the respondents then moved to dismiss the petitioners' cross-bill and said motion was granted, on the ground that, "assuming that the cross-complainants have and can trace a trust fund into said cotton", said court had no jurisdiction and, therefore, that the petitioners' cross-bill should be dismissed. (*T. of R. in No. 420, pages 124–125; Lovell et al.* vs. *Latham & Co. et al., 211 Fed. Rep. 374, 379.*) The decree dismissing the petitioners' cross-bill was modified on appeal, so as to show that it was without prejudice, and as thus modified affirmed, on the ground that the court was without jurisdiction. (*T. of R. in No. 420, pages 139–140; Knauth, Nachod & Kuhne* vs. *Latham & Co. et al., 219 Fed. Rep. 721, 722, 723.*)

3. To review said determination, this Court granted a writ of *certiorari.* (*T. of R. in No. 420, page 146.*)

4. The above cases No. 656 and No. 657 were then pending in the District Court for the Northern District of Florida. They differed from the case in Alabama only in the technical particular that, instead of a cross-bill, they were original suits of an auxiliary and ancillary character. In the suits in Florida the appellants, Knauth, Nachod & Kuhne, presented the same claim to cotton and proceeds thereof in the custody and exclusive jurisdiction of said court. (*T. of R., in No. 656, Fols. 11–16; T. of R. in No. 657, Fols. 8–14.*) After the decision of the Circuit Court of Appeals in the case from Alabama, the appellees in the cases in Florida pressed to argument their motions to dismiss the amended bills of the appellants, Knauth, Nachod & Kuhne. The court in Florida had previously held that it had jurisdiction, by denying motions to quash service and motions to dismiss the original bills. (*T. of R. in No. 656, Fol. 103; T. of R. in No. 657, Fol. 101.*) The appellants, Knauth, Nachod & Kuhne, filed ob-

jections to said motions to dismiss on the ground, among others, that the court was thus asked to deprive them of property without due process of law, contrary to Amendment V and other provisions of the Constitution. This objection was urged on the allegations of the amended bills, which were admitted by the motions to dismiss, that the court had impounded and sequestered the property of the appellants, Knauth, Nachod & Kuhne, within its exclusive jurisdiction and that, to refuse to hear and enforce their right to the same, was to deprive them of their property without due process of law. (*T. of R. in No. 656, fols. 105-106; T. of R. in No. 657, fols. 103-105.*) The Court granted said motions on the ground that it had no jurisdiction and allowed appeals to this Court. No opinion was written, except as expressed in the orders appealed from, but the District Judge stated to counsel that he felt constrained to follow the decision of the Circuit Court of Appeals above mentioned. (*T. of R. in No. 656, fols. 110-113, 122-126; T. of R. in No. 657, 106-109, 115-118.*)

4. The object of the motion is to facilitate a disposition of the cases. The Court should not be asked to hear three separate cases which present the same question of jurisdiction, particularly under the facts and circumstances above set forth. The petitioners and appellants are being prejudiced by the lapse of time and the loss of evidence. The question of jurisdiction will not justify extended argument, as the petitioners and appellants submit, because it has been passed upon repeatedly by this Court. The cases can be readily decided and, if the jurisdiction of the courts below be sustained, remanded for hearing and determination on the merits.

Arthur v. Briesen
Of counsel for petitioners and appellants,
25 Broad Street,
New York, N. Y.

George T. Hogg,
Of Counsel.

*To Counsel for Respondents and Appellees.*

PLEASE TAKE NOTICE that, on the printed records in the cases above mentioned, the foregoing motion will be submitted to the Supreme Court of the United States at Washington, D. C., on the 31st day of January, 1916, at the opening of the Court on that day or as soon thereafter as counsel can be heard; and that, in support of said motion, a memorandum or brief of which the annexed is a copy will be submitted to the Court.

Dated January 6, 1916

Arthur v. Briesen
Of counsel for petitioners and appellants.
25 Broad Street,
New York, N. Y.

George T. Hogg,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

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| KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.* | No. 420. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.* | No. 656. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* vs. MAURICE E. A. WESTPHALEN and others, *Appellees.* | No. 657. |

## MEMORANDUM FOR PETITIONERS AND APPELLANTS.

### POINT I.

**The question of jurisdiction is all that the parties are entitled to have decided by this Court, because (1) that was the only question decided in the courts below and, so far as these cases are concerned, this is a Court of review; (2) if any of the bills of complaint be defective they can be**

**amended; and (3) that is the only question which, in view of the facts of these cases and the division by Congress of appellate jurisdiction between this Court and the Circuit Court of Appeals, the parties are entitled to have decided by this Court.**

*Rules 19 and 28, Present Equity Rules.*
*§§ 128 and 238, Federal Judicial Code as am'd by Act approved Jan. 28, 1915.*

The Court is vested by law with such a broad discretion that it is assumed that it will determine the scope of its review according to the facts and circumstances of each case. For that reason no selection of cases supporting this point has been made. The petitioners and appellants would like nothing better than that this Court should take up the merits of their bills in each of the above cases and point out any defects therein and what facts must be established to sustain the claim therein set forth. In view, however, of the division of appellate jurisdiction that Congress has made for the courts of the United States and the demands on the time and attention of this Court, for the disposition of questions assigned to it, they have no doubt that the Court will feel constrained to confine itself to the question that the parties are entitled to have decided viz.: the question of the jurisdiction of the courts below.

## POINT II.

**The appellants, having filed objections to the motions to dismiss their bills in No. 656 and No. 657, based on a constitutional right to claim property impounded and sequestered by the court** (***Fols. 105-106 and 103-104***)**, could appeal only to this Court. Appeals to the Circuit Court of**

**Appeals are authorized in cases "other than those in which appeals * * * may be taken direct to the Supreme Court."**

*§§ 128 and 238, Federal Judicial Code, as am'd by Act approved Jan. 28, 1915.*

The power of the District Court to impound and sequester the property in question was subject to the constitutional inhibition that the petitioners and appellants should not be deprived of their property without due process of law. They were entitled to present their claim, as a matter of right and not of favor, and have it heard and determined.

*Coe* vs. *Armour Fertilizer Works, 237 U. S. 413, 425, 426.*

## POINT III.

**The motion should be granted and these cases advanced for hearing on March 8, 1916, or such other time as the Court shall deem meet.**

Respectfully submitted, January 6, 1916.

Arthur v. Briesen,
Of Counsel for Petitioners and Appellants,
25 Broad Street,
New York, N. Y.

Thomas M. Stevens, Mobile, Ala.
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Of Counsel.

FILED
NOV 18 1916
JAMES D. MAHER
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1916.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*
*against*
LATHAM & COMPANY AND OTHERS,
*Respondents.*
No. 98.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
*Appellants,*
*against*
WILLIAM S. LOVELL, AS CUSTODIAN, ETC. AND AS TRUSTEE ETC. AND OTHERS,
*Appellees.*
No. 259.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
*Appellants,*
*against*
MAURICE E. A. WESTPHALEN AND OTHERS,
*Appellees.*
No. 260.

## BRIEF FOR LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS AND APPELLEES.

WALKER B. SPENCER,
CHARLES PAYNE FENNER,
*For Respondents and Appellees.*

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

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# Supreme Court of the United States,

OCTOBER TERM, 1916.

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|---|---|
| KNAUTH, NACHOD & KUHNE, Petitioners, AGAINST LATHAM & COMPANY and others, Respondents. | No. 98. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, Appellants, AGAINST WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, Appellees. | No. 259. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, Appellants, AGAINST MAURICE E. A. WESTPHALEN and others, Appellees. | No. 260. |

## BRIEF ON BEHALF OF LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS AND APPELLEES.

### Brief Statement of Proceedings.

Case No. 98 (hereinafter called the Mobile case) comes here on *certiorari* to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit (219 Federal

Reporter, 721), affirming a decree of the District Court of the Southern District of Alabama (Record, pp. 121–125) sustaining motions in behalf of Latham & Company and American Surety Co. and Lovell, Trustee in Bankruptcy of Knight, Yancey & Co. (Record, pp. 109–120), to dismiss the cross bills or bills of intervention filed by Knauth, Nachod & Kuhne, petitioners herein, in a plenary suit brought in the Circuit Court for the Southern District of Alabama by said Lovell, as Trustee in Bankruptcy of Knight, Yancey & Co. against Latham & Company to recover certain four thousand two hundred (4,200) bales of cotton on the ground that the latter had obtained same from the bankrupts by preferential transfer.

The motions to dismiss set up want of equity in the bills and raised additionally the question whether such a cause of action as was stated by the cross-bills could be maintained in another court than that of the Bankruptcy, to wit: the District Court for the Northern District of Alabama. The District Court for the Southern District of Alabama, having superseded the Circuit Court for that District, sustained the motions on both grounds, and not alone for want of jurisdiction, as stated on page 2 of petitioners' brief. (See Opinion, Record, p. 125.)

With a slight and unimportant modification the Circuit Court of Appeals for the Fifth Circuit affirmed this decree, and thereafter petitioners applied for and obtained a writ of *certiorari* from this Court.

It is unnecessary to consider any other proceedings in said case, either in the Circuit Court or in the Circuit Court of Appeals, than those based on the motions of respondents to dismiss. (Record, pp. 109–120.)

With reference to case No. 259 (hereinafter referred to as the Pensacola case), the statement of proceedings by the appellants in their brief (pp. 12–14) is substantially correct.

## Brief Statement of the Case made by the Amended Bill in the Mobile Case.

It will be unnecessary to consider the original cross-bill filed by petitioners, as all of its allegations are embodied in the expansive amended cross-bill. This amended

cross-bill, the Court will find, teems with irrelevant and redundant and utterly vague allegations, and justly merited the criticism of the Court of Appeals of New York, which had occasion, in the case of *Jeffe* vs. *Weld*, 102 N. E. 1104, to pass upon its counterpart filed by the petitioners in that case, that Court saying that the bill was " prolix to a degree not easy to characterize ".

Stripped of its mass of redundant and irrelevant allegations, the essential facts alleged by the amended cross-bill may be stated as follows:

1. The petitioners were bankers doing business in New York, and particularly were so engaged during the period from the 5th to the 18th of April, 1910, and were, as a part of their business, in the habit of buying foreign bills of exchange drawn on persons in Europe against sale and shipments of cotton. (Record, p. 64, par. 6.)

2. That during said period, from the 5th to the 18th day of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York some thirteen drafts, or foreign bills of exchange, to which were attached thirteen export bills of lading purporting to show that thirteen hundred bales of cotton had been shipped by Knight, Yancey & Company for transportation to several European ports. These drafts were drawn to the order of Knight, Yancey & Company, and the cotton mentioned in the bills of lading was to be delivered to the order of Knight, Yancey & Company, and the insurance certificates attached were payable, in case of loss, to Knight, Yancey & Company, and all of these documents were endorsed in blank by Knight, Yancey & Company. (Record, p. 65, par. 9.)

3. That these drafts, bills of lading and insurance certificates were forwarded to an agent of Knight, Yancey & Company in New York for the purpose of selling same to the petitioners or other bankers, as genuine and valid documents, when in fact they were not, and thereby to obtain money of the petitioners or other bankers on the strength thereof. (Record, p. 65, par. 9.)

4. That the petitioners were misled and deceived, and believing that said documents were genuine, purchased same, and delivered to said agent of Knight, Yancey & Company the sum of $98,005.58, and said agent received said money in that capacity, and delivered same, after possibly deducting his commission, to Knight, Yancey & Company. (Record, p. 65, par. 9.)

5. That, as a matter of fact, said bills of lading were forgeries perpetrated by John W. Knight, or some other person. No cotton was ever delivered on said bills of lading, and the drafts drawn against them were not accepted or paid, and were duly protested. (Record, p. 66, par. 11.)

6. That the method in which these drafts and documents were handled by Knight, Yancey & Company was as follows:

The bills of lading were forged by John W. Knight, or some other person acting for the firm, and were delivered by said firm to the First National Bank of Decatur, Alabama, for the purpose of forwarding the same to New York for sale. To these forged bills of lading were attached foreign bills of exchange and insurance documents, and at the time of delivery of these bills of lading and drafts to the First National Bank of Decatur, for the purpose aforesaid, a domestic or currency draft was drawn by Knight, Yancey & Company on their agent or broker in New York, for the approximate sum of the foreign bills of exchange in United States currency, and this domestic draft was deposited with said bank, and by it placed to the credit of said firm. As collateral security to insure the acceptance and payment of the domestic drafts, the bank took other collateral security, ample for its protection against non-acceptance or non-payment of said domestic drafts. (Record, pp. 66–67, pars. 11 and 12.)

7. That the thirteen foreign bills of exchange purchased by the petitioners were all deposited with the First National Bank of Decatur for transmission as aforesaid to

New York between the 5th and 18th days of April, 1910, and were purchased by the petitioners from F. Van Gerpen, acting as agent of Knight, Yancey & Company, and after Van Gerpen had obtained from petitioners the price of said sale, he accepted and paid the domestic drafts for approximately the aggregate face amount of said thirteen foreign bills of exchange, and accounted for the proceeds thereof, and remitted the same to Knight, Yancey & Company, and by them same was deposited, together with other moneys of their own, with the First National Bank of Decatur, or other bank, except as some part of the proceeds may have remained in the hands of Van Gerpen, and afterwards paid over to receivers or Trustee in Bankruptcy. (Record, p. 67, par. 12.)

8. That Knight, Yancey & Company, having deposited the money of petitioners, with other moneys of their own, in the First National Bank of Decatur, or other depositaries, held their entire bank credit or account receivable thus created for the account and in trust for the petitioners, at least to the amount of petitioners' money thus deposited. (Record, p. 68, par. 14.)

9. That at the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, said bank credit was expended (except so far as the same may have remained on hand at the date of bankruptcy, as set forth in Schedule 17 annexed to the bill) for certain cotton, and in the creation of certain credits with brokers called deposits for the purchase of cotton. Some of the said brokers' credits were redeemed in whole or in part, and the money again deposited with the First National Bank of Decatur and again reunited; and some of said bank credits, brokers' credits and other credits representing said trust fund were outstanding at the time of adjudication in bankruptcy, and were subsequently collected by the receivers and the trustee. Certain of the cotton paid for out of said trust fund, or the proceeds thereof, came into the hands of the receivers and trustee, and the estate in bankruptcy has thus been enriched by the money of petitioners, and the receivers and trustee hold all such

cotton, or the proceeds thereof, and all such credits, or the proceeds thereof, in trust for the benefit of petitioners to the extent of $98,005.58. (Record, p. 68, par. 14.)

10. That petitioners are not able to specify all of the cotton paid for out of their money, or all of the money or bank and brokers' credits subject to a trust in their favor, but annex to their bill twenty-one (21) schedules, showing some fifteen or sixteen thousand bales of cotton purchased with their money, and several hundred thousand dollars of monies and credits likewise created, and showing also seventy-six hundred and four (7,604) bales of cotton purchased with trust funds in the possession of the trustee at the time the cross-bill was filed, together with one hundred and two thousand nine hundred and sixty-four and 22/100 dollars ($102,964.22) of cash, the proceeds of other cotton and credits belonging to said trust fund collected by the trustee (Record, pp. 68–69, par. 15.)

11. That all of said cotton and monies which they allege were partly in the hands of the trustee, and partly in the hands of other persons (some of whom even were not parties to this suit), were chargeable with a trust in their favor. (Record, pp. 69–70, pars. 16 and 17.)

12. That the forty-two hundred (4,200) bales of cotton received by Latham & Company, and which were the subject-matter of the suit between Lovell, trustee, and Latham & Company, were received by Latham & Company as an unfair preference from Knight, Yancey & Company, and the transaction was void as to petitioners. (Record, pp. 70–71, pars. 18 and 19.)

13. The prayer for relief is as follows:

(*a*) That it be decreed that the sum of $98,005.58 belonging to petitioners was received by Knight, Yancey & Company, between the 5th and 18th days of April, 1910, and was held by them as the money of petitioners;

(*b*) That Knight, Yancey & Company, and the trustee in bankruptcy, render an account for said money, and set

forth a true account of all cotton or other property purchased, either in whole or in part, with their said money, and render a true account of the disposition made of said cotton and money; a true account of what part of said cotton, or the preceeds thereof, came into the hands of the trustees;

(*c*) That the transfer of Knight, Yancey & Company to Latham & Company of the cotton in question, or of any other property purchased in whole or in part with the money of petitioners, be decreed invalid and void as to them;

(*d*) That it be decreed that Knight, Yancey & Company, and Lovell, trustee, held all such cotton, monies and credits in trust for their benefit, and that it be impressed with a lien to the amount of $98,005.58, and that the Court enforce the execution of said trust by Latham & Company and the American Surety Company, their surety, and by the receivers and trustee, out of the property in their hands;

(*e*) That they have such other relief as may be proper (Record, pp. 73 and 74.)

In other words, by this bill the petitioners sought to have all of the assets of the bankrupt estate of every kind, whether in the hands of the Trustee in bankruptcy or in the hands of third persons, declared to be a trust fund in their favor and impressed with a trust to the extent of their claim, superior to that of all other persons, and only incidentally asked that the cotton of Latham & Company be impressed with such trust by reason of the fact that it was, according to their view, a part of the assets of the bankrupt estate.

## Brief Statement of the Case Made by the Amended Bill in the Pensacola Case.

In all substantial facts alleged, the amended bill in this case (Record, pp. 1–19) is the same as in No. 98, the Mobile case, except that the appellants do not attempt

to impress the whole of the bankrupt estate with their lien, but only a substantial part thereof, but do attempt thereby to impress property never in the custody of either of the Florida courts.

There is also a slight difference in the two suits in the allegations as to how Knight, Yancey & Company obtained the funds with which they purchased cotton. As will have been noted, in the Mobile case they claimed the money was obtained by discounting with the First National Bank of Decatur currency drafts drawn on Van Gerpen, while in the Pensacola case they allege that said firm obtained monies from the First National Bank of Decatur by overdrafts which afterwards they covered by deposit of said currency drafts. But for the purposes of the argument which will hereafter follow, these slight variations in allegations, it will be contended, make no difference in the application of the law or in the determination of the appellants' rights.

The bill prayed for a decree in substance as follows:

1. That Knight, Yancey & Company received and held certain remittance of money from New York, including the money of said complainants, aggregating the sum of $98,005.58, and held said money of said complainants in trust for their benefit, and held the entire remittances of which said monies were a part, subject to a trust or charge for the benefit of complainants to the extent of $98,005.58 with interest.

2. That Knight, Yancey & Company disbursed the monies of said complainants, and the entire fund of bank credit of which said monies became a part, in the purchase, and redemption of certain cotton, or the bills of lading therefor, and then held said cotton or said bills of lading subject to a trust or charge in favor of complainants to the extent of $98,005.58.

3. That Schedules 1 and 2, annexed to the bill, *include certain bales of cotton* which, or the bills of lading for which, were purchased or redeemed with the monies of said complainants.

4. That a trust or charge in favor of said complainants be impressed on the bond in lieu of the cotton set forth in Schedule 1, and on the proceeds of the cotton set forth in Schedule 2, to the extent that said cotton, or the bills of lading therefor, were purchased or redeemed with the monies of the complainants, or with the funds or bank credit of which said monies became a part.

5. That to the end that such trust or charge be enforced, Latham & Company and the American Surety Company be condemned to pay to the complainants the amount of said trust or charge on account of said bond.

6. That Lovell, as Trustee in Bankruptcy of Knight, Yancey & Co., and the First National Bank of Pensacola and the American National Bank of Pensacola pay to complainants out of the proceeds of the cotton set forth in Schedule 2 the amount of the trust or charge on account thereof.

7. That William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, has acquired or claims the cotton which, or the bills of lading for which, was or were purchased and redeemed with the monies of complainants, and with the fund or bank credit of which the monies of said complainants were a part.

8. That said Lovell render an account of the monies of complainants and set forth a full and true account of all and singular the cotton or other property that was purchased or redeemed therewith, and *all the cotton or other property that was redeemed with the fund or bank credit of which said monies were a part*, and that said account set forth the marks of the bales of cotton and what has become of the same, and the value of any part thereof set forth in Schedules 1 and 2.

Here, again, the appellants do not confine their relief to establishing a trust in certain specific bales of cotton in the custody of the Florida court, but seek to establish

it in a large part, if not all, of the bankrupt estate, to wit: "cotton or other property that was purchased or redeemed with the fund or bank credit of which said monies (of the appellants') were a part", and by reference to paragraph 11 of the bill (Record, p. 16) it will appear that this claim extends to all the assets of the bankrupt estate.

It should, however, be noted by the Court that all three of these suits, so far as concerns the petitioners' and appellants' claims, grow out of one and the same transaction, whereby the appellants bought thirteen foreign bills of exchange to which were attached thirteen forged bills of lading, calling for thirteen hundred bales of cotton, and for which they paid the sum of $98,005.58; and the facts alleged in all three to sustain the relief prayed for are substantially the same, although the pleader endeavors to draw different conclusions from these facts in each case. And the fact that the appellants moved for a consolidation of these cases is evidence that they consider the facts substantially the same in all three, and that the same rules of law were applicable to all. In the circumstances, the court will not attempt to find fine differences in allegations of fact in these cases, and will consider them as stating a single cause of action.

## Points Made by Respondents and Appellees.

As additional reasons to those given by the District Courts of Alabama and Florida and by the Circuit Court of Appeals, and as showing that said judgments were correct, we submit the following:

I.

The bills on their faces show that the monies used in the purchase of Latham & Company's cotton were not the monies of the petitioners.

II.

In so far as the bills attempt to charge a trust on the cotton of Latham & Company, they do not trace with sufficient certainty petitioner's money into that cotton to justify a Court in Equity in impressing same with a trust in their favor.

III.

The bills on their faces show that no equitable relief against Latham & Company can be granted, for the reason that the facts alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.

IV.

The District Court for the Southern District of Alabama and the District Court for the Northern District of Florida cannot entertain jurisdiction of appellants' bills nor grant the relief therein prayed for, inasmuch as by said bills the appellants sought to impress the entire bankruptcy estate in the one case, and a large part thereof in the other case with a trust in their favor, which could only be done in and by the court of bankruptcy, to wit: the District Court for the Northern District of Alabama.

## Argument.

In the argument which follows we shall treat the bills in the Mobile and Pensacola cases as being substantially the same, and we shall contend that from whatever aspect the allegations of the bills are considered, no equity is shown in said bills against Latham & Company and the American Surety Company, and that being true, they should be dismissed as to all of the respondents.

We shall discuss, first, the allegations of the bills from the standpoint that their averments *affirmatively* show that the appellants' money was not used in purchasing the cotton, which is the subject matter of said suits; and then from the standpoint that the allegations of the bills show that the appellants are unable to say, with that degree of certainty which the law requires, that their monies, or any part thereof, went into this specific cotton; and then from the standpoint that even if the court could eke out of the allegations of the bills sufficient to say that the appellants' money, or any part thereof, did go into this cotton, yet, in such case, it *affirmatively* appears from the appellants' allegations that their money is still in the hands of the trustee, and they can have, in that event, no relief against the other appellees; and lastly, that as the bill sought to impress a trust on the entire bankrupt estate or substantial parts thereof, not in the custody of the courts *a qua*, and said courts connot entertain jurisdiction of said bills, nor grant the relief prayed for, and properly dismissed the same.

## FIRST POINT.

**The bills on their faces show that the monies used in the purchase of the cotton belonging to Latham & Company, the subject matter of said suits, were not the monies of the appellants.**

For the purposes of the argument of this point, we shall restate, in brief form, the essential *affirmative* allegations made by the appellants in their amended bills which we contend show on the faces of the bills that it was not the appellants' monies that were used in the purchase of the cotton involved in these suits.

For this purpose we shall state the allegations of the bill in the Mobile case, noting any material difference in the allegations in the Pensacola billl.

(1) Between April 5th and 18th, 1910, Knight, Yancey & Company caused to be issued and sent to New York for sale thirteen foreign bills of exchange, to which were attached thirteen fraudulent bills of lading purporting to evidence shipments of thirteen hundred bales of cotton to foreign ports. (Cross-bill, par. 9; Trans., p. 65.)

(2) The said thirteen foreign bills of exchange and said thirteen forged bills of lading were delivered by Knight, Yancey & Company to the First National Bank of Decatur for the purpose of having same forwarded by that bank to a broker in New York for sale to the plaintiff or some other banker. (Cross-bill, par. 11; Trans., p. 66.)

(3) Said drafts were so forwarded to one Van Gerpen, a broker in New York. (Cross-bill, par. 9; Trans., p. 65.)

(4) At the same time said foreign bills of exchange and forged bills of lading were delivered for the purpose aforesaid by Knight, Yancey & Company to the First National Bank of Decatur, a domestic or currency draft was drawn by Knight, Yancey & Company on Van

Gerpen in New York, for the approximate aggregate amount of said foreign drafts. (Cross-bill, par. 12; Trans., p. 67.)

(5) Said domestic drafts on Van Gerpen were deposited in the First National Bank of Decatur to the account of Knight, Yancey & Company and the proceeds thereof were placed to the credit of Knight, Yancey & Company. (Cross-bill, par. 12, Trans., p. 67.)

NOTE: In the Pensacola case the allegation is that Knight, Yancey & Company deposited said currency drafts to cover previous overdrafts allowed them by said bank to enable them to buy the cotton.

(6) To insure the redemption of said domestic drafts on Van Gerpen in case of non-acceptance or non-payment, the First National Bank of Decatur took collateral other than said foreign bills of exchange and forged bills of lading, ample to protect them in such event. (Cross-bill, par. 12; Trans., p. 67.)

NOTE: In the Pensacola case the allegation is, in substance, that to insure the redemption of said domestic drafts, the First National Bank, in addition to other collateral, took said foreign bills of exchange and said forged bills of lading.

(7) Van Gerpen sold thirteen foreign bills of exchange, with said thirteen forged bills of lading attached, to the petitioners, and after receiving payment therefor from the petitioners, accepted and paid the domestic draft drawn on him by Knight, Yancey & Company out of the monies so received from the petitioners. (Cross-bill, par. 12; Trans., p. 67.)

(8) The proceeds of said thirteen foreign bills of exchange were accounted for and remitted to Knight, Yancey & Company by Van Gerpen after deducting his commission and payments, and were by them deposited, with other monies of their own, in the First National Bank of Decatur. (Cross-bill, par. 12; Trans., p. 67.)

(9) That the monies so obtained and so mingled with other monies of Knight, Yancey & Company were used

by them in the purchase of all or some of the cotton mentioned in the twenty-one schedules attached to the bill, which cotton was, at the filing of the suit, in the hands of Latham & Company, the Trustee in Bankruptcy, and the various other persons mentioned in the bill. (Cross-bill, par. 14; Trans., p. 68.)

All of the foregoing facts are contained in *affirmative* allegations made in the bills, and on this statement of facts we claim that it is clear that the funds *actually* used by Knight, Yancey & Company in the purchase of the cotton involved in these cases (assuming that any part of it was so purchased) were the funds of the First National Bank of Decatur, obtained by Knight, Yancey & Company by the discount or deposit of the domestic drafts of Van Gerpen, or by authorized overdrafts, and were not the funds of the complainants, and that the most that can be said is that the funds obtained from the complainants were used by the bank to reimburse itself for monies theretofore advanced to Knight, Yancey & Company, and by them used in the purchase of the cotton.

In this connection it should be noted:

(*a*) The proceeds of the domestic or currency drafts drawn by Knight, Yancey & Company on Van Gerpen were immediately placed to the credit of the account of Knight, Yancey & Company in the First National Bank of Decatur, and were then checked against by Knight, Yancey & Company to buy this cotton; or, if we take the allegations in the Pensacola case, these currency drafts were deposited by Knight, Yancey & Company with the bank to cover overdrafts previously made in the purchase of cotton;

(*b*) The thirteen foreign bills of exchange with the thirteen forged bills of lading attached, according to the allegations in the Mobile case, were not attached to the domestic draft of Van Gerpen as collateral or otherwise; on the contrary, that bill alleges that the bank took other collateral from Knight, Yancey & Company to secure the acceptance and payment by Van Gerpen of the domestic drafts drawn on him. In the Pensacola case it is alleged

that said foreign bills of exchange and forged bills of lading were a part of the collateral taken by the bank to secure the overdraft previously allowed to Knight, Yancey & Company by the bank;

(*c*) The foreign bills of exchange and the forged bills of lading attached according to the allegations of the Mobile bill, were deposited with the First National Bank of Decatur merely to be forwarded by it to Van Gerpen; the First National Bank of Decatur did not buy or discount these foreign bills of exchange or give Knight, Yancey & Company any credit therefor, or thereon, or have any interest therein or relation thereto other than as forwarding agents; the drafts discounted by the bank and upon which Knight, Yancey & Company obtained money to buy cotton were the domestic or currency drafts drawn on Van Gerpen, the acceptance and payment of which was secured by other collateral deposited with the bank by Knight, Yancey & Company. In the Pensacola case the allegation is made that said foreign bills of exchange and forged bills of lading were part of the collateral which the Decatur bank held;

(*d*) Had Van Gerpen refused to accept or pay the domestic drafts drawn on him by Knight, Yancey & Company and deposited or discounted with the First National Bank of Decatur, the First National Bank of Decatur would have had to look to the credit of Knight, Yancey & Company and the other collateral deposited by them with it as security for said domestic drafts;

(*e*) The fact that Van Gerpen used the proceeds of the sale of the foreign bills of exchange to obtain money whereby to pay the domestic drafts and whereby the First National Bank of Decatur was reimbursed for moneys loaned or advanced to Knight, Yancey & Company by overdraft or by discount of such domestic drafts, and with which they purchased the cotton, does not make the money appellants paid Van Gerpen the purchase money of such cotton. To illustrate: If I withdraw by overdraft from a bank $1,000, and with this money buy cotton or other property, which I deliver in payment of an

antecedent debt, and thereafter, to pay said overdraft I sell a fraudulent bill of lading to another for $1,000, and take these proceeds and pay my overdraft at the bank, it cannot be said that such other person's money was the purchase money of the cotton or other property so as to impress that property with a trust in his favor as against the person who received it;

(*f*) The money paid by appellants to Van Gerpen and used by him to pay the domestic drafts for account of the First National Bank of Decatur did not after such payment belong to Knight, Yancey & Company, but to the First National Bank of Decatur, and if such money had been lost in transit the loss would have been the bank's loss.

We think it is plain, therefore, that from the allegations of the bill it affirmatively appears that it was the money of the First National Bank of Decatur and not the money of the petitioners that was used to purchase the cotton involved in this suit.

In the case of *Jeffe* vs. *Weld*, in the State courts of New York, the petitioners made in that case exactly the same contentions by a bill of intervention (the counterpart in its allegations of their cross-bill in this case) that they are making here, and the Supreme Court of New York sustained the contention which we are now making.

> *Jeffe* vs. *Weld*, 132 N. Y. Supp. 505; affirmed by Appellate Division, 139 N. Y. Supp. 1101; affirmed by the Court of Appeals, 102 N. E. 1104.

The Appellate Division, in affirming the decree of the lower court dismissing the petitioners' bill of intervention, said:

> "It does not appear from the allegations of the amended complaint that the cotton which so came in the hands of the defendants was purchased with the plaintiff's money. In fact, it was purchased with money which had been on deposit to the credit of Steele, Miller & Company in their Mississippi banks. That money, or a part of it, had been credited by the banks by reason of the currency

> drafts deposited and which were afterwards paid by Van Gerpen with plaintiff's money. The deposit of the currency drafts was not made for collection, but for the purpose of being immediately credited to the account of Steele, Miller & Company, as in fact it was. * * * The amount thus credited was not the amount paid by the plaintiff, but it was the proceeds of the currency drafts, and for the acceptance and payment of which the banks had taken security from Steele, Miller & Company. The fact that the currency drafts were accepted and paid by Van Gerpen with monies fraudulently obtained from the plaintiffs by reason of other drafts and forged bills of lading, did not, for the reasons above given, enable them to have a trust impressed upon the cotton because the same had not been purchased with their money."

The petitioners in their brief, seeming to think that the question has some bearing here, attempt to avoid the force of this argument by suggesting that "this argument is based on the hypothesis that when the deposit of the currency draft of Knight, Yancey & Company on Van Gerpen was made, it operated as an outright purchase by the bank". In this respect, they entirely misconceive the point which we make.

It is perfectly immaterial in this case whether the bank or Knight, Yancey & Company had *legal title* to these currency drafts after they had been deposited in the bank to account of Knight, Yancey & Company and they had been credited with the proceeds thereof. The question is not one of *title*, but is, whose money was it that Knight, Yancey & Company drew out of the bank on the strength of the deposit of the currency drafts, and used in the purchase of cotton, the bank's or the petitioners'?

It is immaterial to the determination of this question whether the bank purchased the drafts and placed the purchase price to Knight, Yancey & Company's credit, and thereby became the legal owner of the drafts, or whether the bank merely accepted the drafts for collection, leaving Knight, Yancey & Company the legal owners. For the fact still remains that the bank did then and there *loan* or *advance* or *pay* Knight, Yancey & Com-

pany a certain sum of money on the strength of either the domestic drafts or the other collateral deposited specially by them to guarantee the payment of the drafts. It makes no difference which, so far as concerns the validity of our argument. And it was that particular money, so obtained by them from the bank as a loan, advance, or payment, whichever one may choose to call it, which the cross-bill alleges Knight, Yancey & Company used to pay for this cotton. That money was undoubtedly the bank's money. Nor is the situation altered by the fact that Knight, Yancey & Company, by an independent transaction of sale between them, represented by Van Gerpen, and the petitioners, thereafter obtained a sum of money which they used either to repay a loan or advance made to them by the bank on a different account, to wit: A currency draft on Van Gerpen, or that the bank reimbursed itself for the purchase price paid for the currency draft by receiving payment from Van Gerpen out of the monies obtained by him from petitioners.

Let us suppose this case: Knight, Yancey & Company deposited a currency draft on Van Gerpen with the bank and deposited certain stock as security thereto. The bank then placed to their credit the amount of the draft, which they immediately withdrew and used to buy cotton, which they delivered on contract to a third person. At the same time they delivered certain foreign bills of exchange, to which were attached certain bills of lading, to the bank, with instructions to forward same to Van Gerpen. The bank's function with reference to these foreign bills was merely that of forwarding agent. It had no other relation towards these documents, nor any interest in them. Van Gerpen received the foreign bills and sold them to petitioners; received from them the money; but instead of paying the currency draft misappropriated the money, or otherwise misapplied it, and the currency draft was returned unpaid. Whose money is it, which was previovsly drawn out of the bank and used to buy the cotton that was lost, if Knight, Yancey & Company and their collateral failed to make good? Unquestionably, the bank's.

The cases cited by petitioners have no bearing on the

question here presented. The cases of *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442, and *Beale* v. *City*, 50 Fed. 647, and the other cases cited, involve merely the question of *title or ownership as between the bank and the depositor* of a draft deposited in the ordinary course of business without any special understanding or agreement as to whether it was purchased by the bank or taken by it for collection. In all of these cases, the banks had not paid or advanced the depositor anything on account of the draft deposited, and in none of them was the question, whether or not monies paid, advanced, loaned or credited an account of the drafts were the bank's money in any way involved, and these cases, we submit, are not authority in the instant case.

## SECOND POINT.

**The bills do not trace with legal certainty appellants' money into the Latham cotton so as to justify a court of equity in impressing same with a trust in their favor.**

In order to subject specific property, and especially specific property in the possession of a third person, to a trust in their favor, petitioners must trace definitely and certainly the trust funds into the specific property sought to be charged. A mere inference or suggestion on their part that their money was so used is not sufficient, and vague and general allegations that their money was used in the purchase of either the cotton claimed by Latham & Company, or that claimed by Westphalen & Company (who were not parties to the suit), or that claimed by the other persons mentioned (who are not parties to the suit) or that found in the hands of the trustee when bankruptcy was declared, and which showed that the petitioners cannot, with that certainty required by the law, point out the specific property purchased with their money, do not state a cause of action.

The authorities to this effect are so numerous and so unanimous that we content ourselves with a citation of some of the most apposite.

*Litchfield* v. *Ballou*, 114 U. S. at 195.
*Randolph* vs. *Allen*, 73 Fed. 39-40.
*Ferris* v. *VanVechten*, 73 N. Y. 113.
*Phillips* v. *Overfield*, 13 S. W. 705.
*Ober* v. *Cochran*, 45 S. E. 384.
*Parker* v. *Jones*, 67 Ala. 234.
*Ardis* v. *Smith*, 52 Ga. 102.
*Oliver* v. *Platt*, 3 How. 401-402.
*Peters* v. *Blaine*, 133 U. S. 670.
*Metropolitan Bank* v. *Campbell*, 77 Fed. 705.
*Empire* v. *Carroll*, 194 Fed. 604.
*Jeffe* v. *Weld*, 132 N. Y. Supl. 505; and 39 Cyc. 530, 551.

An examination of the allegations of the bill shows on its face that the petitioners cannot trace their money with the required certainty into the Latham cotton. A reading of the 14th, 15th, 16th and 17th paragraphs of their amended cross-bill (Trans., pp. 68-70) in the Mobile case will show their utter uncertainty as to whether their monies were used in the purchase of the Latham cotton in Mobile, or the Latham cotton in Pensacola, or the Westphalen cotton in Pensacola, or the Ingelfingen cotton in New Orleans, or the large amount of cotton that came into the trustee's hands from the possession of the bankrupts, or whether it formed a part of the monies deposited by Knight, Yancey & Company with a dozen or more banks or brokers or formed a part of the monies that were found in possession of the bankrupts at the time of their bankruptcy. And, finally, having designated every bale of cotton purchased by Knight, Yancey & Company after April 5, 1910, every bank or broker's credit opened by them after that date, and every payment made by them as having been purchased or made out of their monies, all of which property they described in twenty-one (21) schedules covering twenty-six (26) pages of the

printed transcript, they conclude the 20th paragraph of their cross-bill with the statement:

> "The schedules hereto annexed are made part hereof, but they are not exclusive, and your orators, Knauth, Nachod & Kuhne, will ask leave to follow their money into any assets that may have come into the hands of the receivers or trustee. They also submit that any assets in the hands of the trustee should be applied to the reimbursement of their $98,005.58, first of all, whether their money be traced into the same or not."

So with reference to the bill in the Pensacola case. The Court will look in vain for any allegation which would justify them in saying that the appellants have pointed out specific property into which their money went, and when the allegations in this bill are taken in connection with those in the Mobile case and w[illegible]hose in the Westphalen case, it is perfectly obvious [illegible]e appellants have not the faintest notion into wha[illegible] property their money went.

This is the same bill conc[illegible]the New York Court of Appeals, in the ca[illegible] v. *Weld*, 102 N. E. 1104, *sustaining the point v[illegible]ow make*, made these observations:

> "There can be no doubt of the rule that funds obtained by fraud may be followed through however many transmutations of form they may have passed, so long as the rights of a third party for value and in good faith do not intervene; but this complaint, though prolix to a degree not easy to characterize, is so replete with hypothetical and alternative allegations that it is not possible on any reasonable interpretation to spell out any direct allegation that the money obtained from these plaintiffs did in fact pass into the cotton upon which it is sought to impress a trust."

## THIRD POINT.

**The bills on their faces show that no equitable relief against these respondents could be granted for the reason that the facts affirmatively alleged show that the relief, if any, should be against the Trustee in Bankruptcy alone and could not be granted in this suit.**

We base our contention on this point upon the well-settled principle that when trust funds have been *mingled* with the private funds of a trustee and payments have been made out of such mingled funds, the presumption is that the trustee paid out of his own private funds, if sufficient funds are found in his hands to satisfy the trust funds.

*Gorman* v. *Littlefield*, 229 U. S. 19.
*Empire* v. *Carroll*, 194 Fed. 604–605.
39 Cyc. and authorities there cited.
3rd Pomeroy, Eq. Jurisprudence, Sec. 1049, pages 2021–2022.

The rule is thus stated by Pomeroy:

> "When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the Court that he has withdrawn his own money and left the trust fund; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust fund."

If, therefore, the bills show by their affirmative allegations, that there are in the hands of Knight, Yancey & Company, or in the hands of their trustee in bankruptcy, of these alleged mingled funds or of cotton, sufficient to satisfy the claims of the petitioners, then the presumption is that the funds or property so remaining in the hands of Knight, Yancey & Company, or their trustee in bankruptcy, are the funds or property of the petitioners.

Especially will this presumption be invoked in behalf of a third person, because it is a well-settled principle that a third person should not be disturbed where the trustee or his representative is able to respond, or where the *cestui qui trust* can obtain relief without disturbing the rights of such third person.

*Crutchfield* vs. *Haynes*, 14 Ala. 49.
*Litchfield* v. *Ballou*, 114 U. S. 195.

An examination of the schedules attached to the appellants' amended cross-bill in the Mobile case shows that there are in the hands of the Trustee in bankruptcy both cotton and monies claimed by them to be a part of the trust fund for their benefit sufficient times many over to satisfy their claims.

The following cotton is alleged by that bill to be in the hands of the Trustee and to constitute the cotton or a part thereof, purchased with the appellants' money, to wit:

| | |
|---|---|
| Schedule 7 | 965 Bales. |
| Schedule 9 | 1,998 Bales. |
| Schedule 10 | 306 Bales. |
| Schedule 21 | 4,336 Bales. |
| Total | 7,064 Bales. |

| | |
|---|---|
| Schedule 17 (Monies, etc.) | $23,612.06 |
| Schedule 18 (Monies, etc.) | 79,352.16 |
| Total monies now held by Trustee. | $102,964.22 |

In other words, the trustee has remaining in his hands, out of the alleged trust fund, more than six times the number of bales of cotton claimed by the petitioners to be due them, and an amount of cash in excess of their disbursements.

In these circumstances, we submit that a court of equity will not decree a trust against property in the possession of a third person, when it affirmatively appears that a sufficient amount of the trust funds remains in the hands of the trustee to satisfy his claim.

## FOURTH POINT.

**The District Court for the Southern District of Alabama and the District Court for the Northern District of Florida could not entertain jurisdiction of the appellants' bills nor grant the relief therein prayed for, inasmuch as by such bills the appellants sought to impress the entire bankrupt estate in the one case, and a large part thereof in the other case with a trust in their favor, which could only be done in and by the court of bankruptcy, to wit., the District Court of the Northern District of Alabama.**

It seems to us perfectly obvious, from a reading of the bills in these cases, that the theory of the plaintiff is that whereas $98,000 of their money, illegally obtained, was mingled with other funds of the bankrupt, evidently amounting to large sums of money, the whole of the funds of Knight, Yancey & Company passing through the First National Bank from April 5th to April 20th became a trust fund for their benefit, and that all of the cotton purchased by said firm between said dates became impressed with a trust in their favor, superior to and exclusive of the rights of all other persons. The property represented by this mingled fund constitutes the bankrupt estate, and the relief prayed for by the bills is that this estate be charged with a lien in their favor. It further appears from the bills that only a very small part of the fund sought to be reached could, by any stretch of the imagination, be said to be in the custody of the courts *a qua*. The balance of it is in the hands of the Trustee in Bankruptcy appointed by the District Court of the Northern District of Alabama, or in the hands of persons without the jurisdiction of those courts.

It seems to us almost too plain for argument that if the appellants are entitled to impress the bankruptcy

estate with a lien in their favor, they must seek that relief in the court which is administering that estate, and the courts below properly declined to take jurisdiction of a bill seeking such relief, and properly, in the circumstances, referred the appellants to the Bankruptcy Court.

In conclusion, we wish to call the Court's attention to the fact that these appellants have already had ample opportunity to amend their bills to state a case, and have endeavored to do so; that it is perfectly patent from the amended bills which they have already filed it is utterly impossible for them to state a case against these appellees, and that it would be a waste of time and would be productive of great delays and expense to further retain said bills in the Courts.

We respectfully submit that the judgments below should be affirmed, at appellants' cost.

WALKER B. SPENCER,
CHARLES PAYNE FENNER,
for Latham & Company and
American Surety Co.

# Supreme Court of the United States,

OCTOBER TERM, 1916.

| | |
|---|---|
| KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.* | No. 98. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.* | No. 259. |
| MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* MAURICE E. A. WESTPHALEN and others, *Appellee.* | No. 260. |

## REPLY FOR PETITIONERS AND APPELLANTS.

Counsel for petitioners-Appellants have not seen the briefs for respondents-Appellees. The order of November 13, 1916, seems to require, however, that any reply be submitted with the answering briefs of the respondents-appellees on or before November 20, 1916.

**The principal brief for the petitioners-appellants presents almost exclusively points pertaining to the question of jurisdiction, because that was the only question passed on by the courts below; and, if the bills of complaint be held defective, an opportunity to amend them should be accorded.**

> "No * * * proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; * * * and such court shall amend every such defect and want of form * * *; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> *§954, U. S. R. S.*

> "The court may at any time * * * permit any * * * pleading or record to be amended. * * * The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

> "The plaintiff may, as of course, amend his bill before the defendant has responded thereto" * * *
>
> *Rules 19, 28, Equity Rules.*

The only answer that has been filed is that of the appellee Trustee in the Westphalen & Company suit at Pensacola.

The doctrine that the bankruptcy proceedings in the Northern District of Alabama *ipso facto* vested the bankruptcy court with the custody and an exclusive jurisdiction over the property in question, although it was held adversely by Latham & Company and Westphalen & Company, was not contended for by counsel in the Circuit Court of Appeals and we understand that it will not be seriously advocated in this Court.

The Trustee contended in the Circuit Court of Appeals: (1) that, because the claim of Knauth, Nachod & Kuhne was prior and paramount and not subject to or in any way dependent on his interest or that of the adverse holders, they had no right to intervene, although unknown claimants were im-

pleaded, and the District Court had no jurisdiction to hear and enforce their rights; and (2) that their bill was multifarious and tended to reduce the litigation to chaos. By multifarious he could only mean that the same claim was presented as to different lots of cotton. As a corollary to his contentions, he concluded that Knauth, Nachod & Kuhne could have attached the property in question, regardless of the fact that his suit was for the delivery thereof and regardless of the fact that the Court held the proceeds thereof or forthcoming bonds therefor. Latham & Company, on the other hand, contended for the view that the bill of Knauth, Nachod & Kuhne was without equity and based this contention: (1) on the theory that the property in question was bought by the bankrupts with their own money, before the money of Knauth, Nachod & Kuhne was received; (2) on the theory that Knauth, Nachod & Kuhne had not traced their money into the property in question; and (3) on the theory that enough property remained in the hands of the Trustee and, therefore, Knauth, Nachod & Kuhne could not reclaim property that had been transferred to Latham & Company.

Assuming that the same contentions will be urged upon this Court, the following points may assist the Court in reaching its conclusions:

## POINT I.

**There is a broad distinction between a pure cross-bill, in a suit *in personam*, and a cross-bill or whatever it should be called by which a pursuing owner presents a prior and paramount right to property that has been impounded and sequestered by a court of equity.**

It is submitted that the cases on which the respondent Trustee relies have no application to the cross-bill of a pursuing owner. Names are not things and definitions are not the things defined. Any precedent as to cross-bills applies only to the kind considered.

## POINT II.

**The remedy, if a bill contain too much, is not a motion to dismiss but a motion to strike out redundant matter or for a better statement of claim. The remedy, if the original and cross-suits in this instance could not be conveniently tried together, would be an order for separate trials. But it is clear that there should be but one judgment and no good reason appears for separate trials.**

*Rules 20, 21, 26, Equity Rules.*

Unknown claimants were impleaded. Knauth, Nachod & Kuhne were permitted to intervene. The Trustee seeks to recover the property in question. Knauth, Nachod & Kuhne seek to impress it with a trust or charge for their benefit, to the extent that it represents their money. To that extent they controvert the Trustee's right to recover it at all. They are pursuing owners and demand their own property and submit that they are entitled to recover it and that the Trustee has no right to it and the bankruptcy court no right to administer it. On the other hand, Latham & Company should not be required to produce it and surrender it to two different claimants in separate suits. The Trustee will make out a case, if at all, by showing that a preference has resulted and that there were reasonable grounds to believe that a preference would result. Knauth, Nachod & Kuhne will make out a prior and paramount right by showing that the bankrupts held their money as trustees *ex maleficio* and utilized the same in the purchase and redemption of certain parts of the property in question. If Latham & Company are unable to meet the proof of Knauth, Nachod & Kuhne, the property will be awarded to them, to the extent of their claim, and will not pass through the hands of the Trustee. If Latham & Company succeed as against the Trustee, the balance will be awarded to them and never pass through the hands of

the Trustee. Is it not clear that there should be but one judgment, awarding the property to the rightful claimant?

Is it not clear also that Knauth, Nachod & Kuhne could not have proceeded in a state court to attach the property while it was in litigation? Latham & Company could not be deprived of the right to produce it in discharge of their forth-coming bond; or be compelled to surrender it to two different claimants. The Trustee could not be deprived of his right to a delivery of the property or its proceeds, in advance of a determination of the rights of the respective claimants.

## POINT III.

**The points made on behalf of Latham & Company proceed on a wrong view of the facts admitted by the motions to dismiss and of their remedies, in case of uncertain allegations, to wit:**

1. Certain parts of the property in question were purchased and redeemed with the money of Knauth, Nachod & Kuhne after it was received by the bankrupts, not with money previously advanced by their local banks, as assumed on behalf of Latham & Company. (*A quotation from the bill at Mobile is printed, together with a reference to the pages of the Transcript, at page 11 of the principal brief for Knauth, Nachod & Kuhne; Transcript in No. 259, fols. 37–39, 42–46.*)

2. The allegations of the bills of Knauth, Nachod & Kuhne referred to above are definite and certain but, if not, the remedy is a motion for a further and better statement and not a motion to dismiss. (*Rule 20, Eq. Rules.*)

3. Knauth, Nachod & Kuhne have the right to follow their money into the property in question, whether the Trustee holds enough property to satisfy their claim or not. The bills do not allege that all the property in question was purchased or redeemed with their money, only certain parts of it. If Latham & Company claim that

there should be an accounting for all property purchased with the trust fund and the same applied to the claim of Knauth, Nachod & Kuhne in the inverse order of alienation, on the theory that the bankrupts transferred their own cotton first, their remedy is to allege the facts relied upon and ask for that relief.

4. It is a novel proposition that a bill should be dismissed because the pleader asks for too much or too little or the wrong relief. The remedy is to ask that only the proper relief be granted. If there be any reason for it, the scope of the bill can be reduced in advance. (*Rule 21, Eq. Rules.*)

The case of *Jaffe* vs. *Weld* (132 N. Y. Supp. 505 and 155 N. Y. App. Div. 110; 139 N. Y. Supp. 1101. Aff'd on other grounds, 208 N. Y. 593; 102 N. E. Rep. 1104) has no application to the suit at bar. At Special Term and at Appellate Division that case proceeded expressly and exclusively upon the doctrine that the deposit of a draft in a bank is presumptively an outright sale thereof to the bank, in the absence of an agreement to the contrary. If there be any such presumption under the law of New York, which we doubt, it is contrary to the presumption which obtains generally throughout the country. (*See cases cited on page 32 of principal brief for Knauth, Nachod & Kuhne.*) The Court of Appeals declined to follow that doctrine but placed its determination upon the doctrine that the hypothetical and alternative allegations in the complaint rendered it demurrable. There are no hypothetical or alternative allegations in the bills before the Court. In that case the complaint has been amended and the amended complaint has been sustained. (*N. Y. Law Journal, July 5, 1916. page 1266.*)

If this Court consider the question of pleading urged on behalf of Latham & Company, that the bills should be more definite and certain, the following cases are submitted:

*Hooley* vs. *Gieve, 9 Daly, 104, 110, 112–113, 114–115.* (Gen'l Term, N. Y. Com. Pleas, 1879.) Approved and affirmed, *82 N. Y. 625; 9 Abb. N. C. 8, 40, 41.*

*Lafort* vs. *Carpenter*, *91 Hun 76*, *80-81*. Aff'd on opinion below, *154 N. Y. 757*.

*Smith* vs. *Township of Au Gres, Mich.*, *150 Fed. Rep. 257*, *260-261*; *80 C. C. A. 145*.

*Westinghouse Electric M'f'g Co.* vs. *Wagner Electric and M'f'g Co.*, *225 U. S. 604*, *618*, *619*, *620*, *621-622*, *622*.

Respectfully submitted November 17, 1916.

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# Supreme Court of the United States.

OCTOBER TERM, 1916.

KNAUTH, NACHOD & KUHNE,
*Petitioners,*
*against*
LATHAM & COMPANY AND OTHERS,
*Respondents.*
**No. 98.**

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
*Appellants,*
*against*
WILLIAM S. LOVELL AS CUSTODIAN ETC. AND AS TRUSTEE ETC. AND OTHERS,
*Appellees.*
**No. 259.**

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
*Appellants,*
*against*
MAURICE E. A. WESTPHALEN AND OTHERS,
*Appellees.*
**No. 260.**

## BRIEF FOR PETITIONERS AND APPELLANTS.

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*Of Counsel for Petitioners and Appellants.*

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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and as modified affirmed a decree of the United States District Court for the Southern District of Alabama, the same having been granted on motion and entered in the office of the Clerk of said Court on January 24, 1914. The decree of said District Court had dismissed the bill of the petitioners, in the nature of a cross-bill or otherwise, for want of jurisdiction. It was modified merely so as to show that said dismissal was without prejudice. (*Transcript of Record in No. 98, pp. 124-125, 125-126, 140, 146.*)

The second and third cases above are appeals from decrees of the United States District Court for the Northern District of Florida dismissing bills of the appellants, for want of jurisdiction. In making said decrees, the Court felt constrained to reverse its former rulings, on denying motions to quash service and to dismiss the original bills, and to follow said decision of said Circuit Court of Appeals. (*Transcript of Record in No. 259, fols. 103, 112; Transcript of Record in No. 260, fols. 101, 108.*) By an order entered February 21, 1916, this Court directed that said appeals be heard with said *certiorari*, as one case.

References are made to the *pages* of the printed transcript in the first above case and to the *folios* of the second and third.

STATEMENT, RULE 21, ¶ 2, SUB. (1).

1910.

April 29. The respondents, the Receivers in Bankruptcy of Knight, Yancey & Company, together with a creditor of said firm, "for himself and all other creditors who may become or make themselves parties to this proceeding", filed their bill in equity in the United States Circuit Court for the Southern District of Alabama against the respondents Latham & Company and the bankrupts and certain carriers. Said suit was brought to impound and sequester, by writs of injunction and sequestration, some 7800 bales of

cotton; also to set aside the transfer thereof by said bankrupts to said Latham & Company, as a voidable preference; and also to require said defendants "to deliver said cotton to your orators", said Receivers and creditor. Said suit was instituted pursuant to an order of the bankruptcy court for the Northern District of Alabama, by which court the adjudication of bankruptcy had been made and said Receivers had been appointed. Said Receivers had attempted to institute an ancillary bankruptcy proceeding in the United States District Court for the Southern District of Alabama, for the purpose of impounding said property and requiring the delivery thereof to them, but that was before the Act of June 25, 1910, authorized ancillary proceedings in bankruptcy, by adding clause 20 to § 2 of the Bankruptcy Act (39 St. at L. 839), and before the effect of the decision in Babbitt *vs.* Dutcher (216 U. S. 102, 114–115) was well understood and, therefore, their application had been denied. (*Transcript in No. 98, pp. 7, 8, 16, 39.*)

May 4-9. Pursuant to an order of said Court and a writ of sequestration in said suit, the Marshal took possession of 4200 bales of said cotton. (*Transcript in No. 98, pp. 17–21.*)

May 5. Said Receivers and creditor obtained an order amending their bill and the prayer thereof as follows:

NEW ALLEGATIONS.

"4½. Your orators are informed and believe and on such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of any such right, title or interest claimed in and to said seventy-eight hundred (7800) bales of cotton is unknown to these complainants." (*Transcript in No. 98, pp. 22–23.*)

NEW PRAYER.

"That all persons, firms or corporations who claim any right, title or interest in and to said seventy-eight hundred (7800) bales of cotton be

made parties defendents to this bill and be cited by publication to answer this bill." (*Transcript in No. 98, 23.*)

May 14. Said Circuit Court permitted the respondents Latham & Company to substitute a forthcoming bond for the cotton that had been sequestered, the condition being that they shall "deliver within sixty days from date of any final decree of this court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises." The respondent, American Surety Company of New York, is the surety on said bond. (*Transcript in No. 98, pp. 27–29.*)

July 1. The petitioners Knauth, Nachod & Kuhne, being thus called upon to do so, filed their answer to said bill of said Receivers and creditor and their cross-bill or whatever it should be called. Said cross-bill was filed pursuant to the following decree of said Circuit Court:

> "That the defendants Knauth, Nachod & Kuhne (impleaded as unknown persons by the amendment allowed to the bill of complaint by the order entered herein on the 5th day of May, 1910) be and they hereby are granted leave to file their cross-bill in this cause; and that the same be filed and process issued according to the prayer thereof." (*Transcript in No. 98, p. 35.*)

No motion to vacate said order or any objection to the entry thereof has ever been made and the same remained in force when the cross-bill was dismissed by the decree under review. A further order was thereafter made, directing substituted service of *alias subpœnæ ad respondendum.* (*Transcript in No. 98, pp. 37–38.*)

August 20. The respondent Trustee was substituted as sole complainant in place of said Receivers and creditor and filed a supplemental bill, said Circuit Court holding that said Receivers were "not necessary or proper parties" but sustaining the suit in the right of said creditor who, it should be borne in mind, had sued "for himself and all other creditors who may

become or make themselves parties to this proceeding." (*Transcript in No. 98, pp. 39, 42, 44-49; Frost et al.* vs. *Latham & Co. et al., 181 Fed. Rep. 866, 867-868, 870.*)

September 5. Said Receivers and creditor and Trustee, professing to appear specially, moved to dismiss said cross-bill of Knauth, Nachod & Kuhne, for want of jurisdiction of "subject matter"; and said Trustee also moved to strike out the answer of said Knauth, Nachod & Kuhne on the ground that they had no right to answer. Ten days later the respondents Latham & Company and American Surety Company of New York demurred to said cross-bill of Knauth, Nachod & Kuhne on the ground that there was both a want of jurisdiction and a want of equity. (*Transcript in No. 98, pp. 49, 50, 51-52, 53-54.*)

It should be noted that said motions and demurrers present the question whether said respondents, by attacking the jurisdiction of the subject matter of said cross-bill and the merits thereof instead of merely moving to quash service or to vacate the order under which it was filed, did not *ipso facto* appear generally and submit themselves to the jurisdiction of said Circuit Court, provided that said court in any district would have had jurisdiction.

December 20. The Petitioners Knauth, Nachod & Kuhne were permitted by a decree of said Circuit Court to file the amended cross-bill before the Court, or whatever it should be called, in place of the original cross-bill. (*Transcript in No. 98, p. 60.*) The claim of Knauth, Nachod & Kuhne is, in substance, that parts of the cotton in question equitably belong to them and that their right to the same is both prior and paramount to any interest of the respondents. (*Transcript in No. 98, pp. 64, 65, 67, 68, 69, 71; Schedules 5, 6 and 7, pp. 82, 83, 86.*)

No motion to vacate said decree has ever been made and the same remained in force when said amended cross-bill was dismissed by the decree under review.

1911

March 21. Said Circuit Court granted a decree striking out the answer and cross-bill and amended cross-bill

of Knauth, Nachod & Kuhne, for want of jurisdiction, on motion of the respondent Trustee who again professed to appear specially but nevertheless moved for said decree on the ground that there was both a want of jurisdiction and a want of equity. (*Transcript in No. 98, pp. 98-100, 102-103, 104; Lovell* vs. *Latham & Co. et al., 186 Fed. Rep. 602, 602-603.*)

It should be noted that in its opinion said Circuit Court indicated that the only remedy of Knauth, Nachod & Kuhne was to wait until the respondent Trustee had recovered judgment and collected it and then present a claim to the bankruptcy court. This presented the question whether Knauth, Nachod & Kuhne, as pursuing owners, were barred or hindered and delayed from presenting a prior and paramount right to certain parts of the property in question because it had been impounded and sequestered by a court of equity, at the suit of parties whose rights, if any, were subsequent and inferior to their own. Said court held that because the rights of Knauth, Nachod & Kuhne were prior and paramount—" new and distinct * * * not auxiliary to or a dependency upon this suit and not essentially connected with the original bill therein "—it had no jurisdiction. It decided the question on the merits without reference to the fact that it was presented by motion instead of demurrer, except that leave to amend was not granted.

The above is not the decree under review. It was reversed, as hereafter set forth, and is mentioned because said question has been carried over to the decree that is under review.

1912

January 1. The United States District Courts succeeded the Circuit Courts for each district respectively.

December 3. Said decree, striking out the answer and cross-bills of Knauth, Nachod & Kuhne, was reversed by the United States Circuit Court of Appeals for the Fifth Circuit.

"The amended cross-bill sets up that Knight, Yancey & Co. obtained from the appellants $98,-

005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit. * * *

We are of the opinion that, under the circumstances which called the appellants into the case and, in view of the rights which they have asserted by leave of the court, their answer and cross-bill, or intervening petition, should not be summarily stricken from the files."

*Knauth, Nachod & Kuhne* vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

1914.

January 24. The United States District Court for the Southern District of Alabama granted the decree, dismissing the cross-bill of Knauth, Nachod & Kuhne, which was modified and as modified affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, by the decree now under review. Said decree was granted on motions filed by the respondents. Knauth, Nachod & Kuhne had intended to amend their bill so as to allege merely the ultimate facts, as prescribed by the present Equity Rules, and so as to omit a claim to property in other districts which, because of technical objections in this suit, had been put in litigation elsewhere. But, shortly after the filing of the mandate of the Circuit Court of Appeals on the decision above quoted and before such amendment could be made and on January 31, 1913, the day before the present Equity Rules went into effect, the respondents filed demurrers on the ground that there was both a want of jurisdiction and a want of equity. Said demurrers were never brought to a hearing but the motions to dismiss were filed, on the same grounds. The decree itself recites that it is granted both for a want of jurisdiction and a want of equity but the opinion shows that a want of equity is predicated solely on a want of jurisdiction; and, of course, a want of jurisdiction precludes passing on the merits of a bill. (*Transcript in No. 98, Notices of Motion, pp. 109-112, 113-116, 117-120; Decree, pp. 125-126; Opinion, 124-125 and Lovell et. al.* vs. *Latham & Co. et al., 211 Fed. Rep. 374, 378-379.*)

It should be noted that in the motions on which said decree was granted the respondents do not even

profess a special appearance; and that the want of jurisdiction, according to the decision of the District Court, was that of a Federal court as such. That is to say, the decision proceeded on the theory that no United States District Court would have jurisdiction:

> "The cross-complainants are seeking to impress a trust upon certain cotton a part of which they allege their money purchased, and that they have a trust fund in that cotton. The cotton is in the possession of defendants Latham & Company, the title to which they claim under the transfer and delivery to them by Knight, Yancy & Co. Assuming that the cross-complainants have and can trace a trust fund into the said cotton, how must they proceed to establish their claim and to impress their trust upon said cotton? Manifestly by a suit against said Latham & Company, who have said cotton in their possession and claiming it as their property. Some of the cross-complainants are resident citizens of New York State and some of Germany while Latham & Company are resident citizens of France. How and where does this court acquire jurisdiction to try and determine the controversy between these parties? It certainly acquires no such jurisdiction under the Bankrupt Act; and the general law conferring jurisdiction on the ground of diverse citizenship of the parties to the litigation has no application to the case, in view of the facts shown in it. No jurisdiction of the litigation between the cross-complainants and the defendants Latham & Company has been acquired by the consent of said defendants. * * * this case, in substance and effect, is a suit by them against Latham & Company of which, in my opinion, this court has no jurisdiction, whether the attitude of the so-called cross complainants is that of cross complainants, or intervenors as they may be called.
>
> A motion to dismiss a bill for want of equity should be sustained if, admitting the facts apparent on the face of the bill, whether well or ill pleaded, the complainant can have no relief."
>
> *Transcript in No. 98, pp. 124-125; Lovell et. al. vs. Latham & Co. et al., 211 Fed. Rep. 374, 379.*

It should also be noted that the above is sharply at variance, as to the remedy of Knauth, Nachod & Kuhne, with the former decision to strike out their

answer and cross-bill; also that it presents the following questions: (1) whether any United States District Court has jurisdiction to enforce the rights of any pursuing owner of property that it has impounded and sequestered, in a suit in equity, unless there be a diversity of citizenship; (2) whether a sale of property that has been impounded and sequestered by a court of equity and a deposit of the proceeds in court or, what is the same thing, a substitution of a forthcoming bond therefor does not free the property or at least permit a pursuing owner to follow the proceeds thereof, in the possession of the court; and (3) whether, if any United States District Court would have had jurisdiction, the right to be sued in a particular district was not waived by a presentment of the merits of the bill and jurisdiction of the subject matter thereof.

1915

January 18. The United States Circuit Court of Appeals for the Fifth Circuit modified and as modified affirmed said decree dismissing the bill of Knauth, Nachod & Kuhne, by the decree now under review. The modification was merely so that the decree would show that the dismissal was without prejudice. (*Transcript in No. 98, p. 140.*) The ground of decision was that the proceedings in bankruptcy in the United States District Court for the Northern District of Alabama brought the property in question within its exclusive jurisdiction and

> "Hence the appellants had no place in the suit instituted by the trustee merely to set aside a preferential transfer. If as claimed they may impress a trust in their favor on any of the assets of the bankrupts in the hands of the trustee no reason is perceived why they may not proceed in the court of original jurisdiction. In any event they will not be permitted to intervene in an ancillary suit, brought by the trustee, the sole purpose of which is to collect assets of the bankrupt and transfer them to the proper court for administration."

*Transcript in No. 98, pp. 139-140; Knauth, Nachod & Kuhne* vs. *Latham & Co. et al., 219 Fed. Rep. 721, 722-723; 135 C. C. A. 419.*

It should be noted that the above reverts to the doctrine on which the answer and bill of Knauth, Nachod & Kuhne were first stricken out and, in effect, reverses the doctrine that no United States District Court would have jurisdiction of their claim, the doctrine on which their bill was dismissed.

It should also be noted that the above presents the following questions: (1) whether the property in question, which was held by Latham & Co. under a claim of right, came into the custody of the United States District Court for the Northern District of Alabama, when bankruptcy proceedings were instituted therein by Knight, Yancey & Company, or whether the conditions that made the transfer thereof voidable must be established and the transfer set aside before said property can come into the custody or the exclusive jurisdiction of said Court; (2) whether the bankruptcy court did not waive its exclusive jurisdiction, if ever acquired, by authorizing its Receivers to join with a creditor in the suit to impound and sequester the property in question; (3) whether, if any owner of property impounded and sequestered by a court of equity cannot present his claim to it, the fact that unknown claimants were impleaded in this case and called upon to present their claim did not authorize Knauth, Nachod & Kuhne to present their claim; (4) whether, by attacking the cross-bill of Knauth, Nachod & Kuhne both as to its merits and as to jurisdiction of the subject matter thereof, the respondents did not waive their right to be sued in any particular district, provided that any United States District Court would have had jurisdiction thereof; and (5) whether a United States District Court as such can follow the usual rule that when a court of equity impounds or sequesters property, it *ipso facto* acquires jurisdiction and assumes the duty to hear and enforce the rights of any claimant of the same.

February 22. A re-hearing by said Circuit Court of Appeals was denied. (*Transcript in No. 98, p. 143.*)

April 28. A writ of *certiorari* was granted by this Court. (*Transcript in No. 98, p. 146.*)

The nature of the claim of the petitioners, Knauth, Nachod & Kuhne, appears in the foregoing excerpts from the opinions of the courts below. The following parts of their bill is also submitted:

> "6. The seventy-eight hundred and eighty-two (7882) bales of cotton or property, mentioned in the bill of complaint in the original suit, or some parts thereof, had been paid for by the bankrupt firm of Knight, Yancey & Company with the proceeds of money belonging to your orators, the present complainants, the firm of Knauth, Nachod & Kuhne, and was subject to a charge in their favor and to that extent equitably belonged to said firm, as hereafter more fully set forth * * * after your orators Knauth, Nachod & Kuhne, * * * had delivered their money to said F. Van Gerpen * * * said foreign drafts were all accounted for and the proceeds thereof remitted to Knight, Yancey & Company and deposited by them, with other money, in the First National Bank of Decatur * * *. At the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, the said bank credit or trust fund was expended * * * for certain cotton. * * * Parts of the cotton mentioned in all said Schedules 5 to 14 inclusive were paid for out of the money of Knauth, Nachod & Kuhne and out of the bank and other credits constituting the said trust fund held by the said bankrupts for their benefit." * * * Schedule 5 contains the 4,200 bales sequestered in this suit; and Schedules 6 and 7 contain the "Latham" cotton at Pensacola which was sought to be impounded by this suit at the time the appellants intervened.
>
> *Transcript in No. 98, pp. 64, 67, 69, 82.*

The appeals from decrees of the United States District Court for the Northern District of Florida involve substantially the same questions but they have arisen under a somewhat different course of litigation. The Receivers and creditor of Knight, Yancey & Company were granted ancillary proceedings in bankruptcy, whereas their application therefor had been refused in the Southern District of Alabama. Knauth, Nachod & Kuhne were not impleaded as unknown claimants in the original suits in that district and their application to intervene was denied but they were granted leave to file original bills on the

theory that, by impounding the cotton there in question, the Court acquired an ancillary jurisdiction and assumed the duty of hearing and enforcing the rights of all claimants. The following are the facts and circumstances:

1910.

May 11. The United States District Court for the Northern District of Florida, by an injunction order in an ancillary proceeding in bankruptcy, impounded the property there in question, the same being in the possession of the Louisville & Nashville Railroad Company. Subsequently the appellee Lovell as Trustee brought a plenary suit for the continuation of said injunction order and the recovery of the impounded cotton that was claimed by the appellees Latham & Company. On July 8, 1910, an order was made in said suit directing the delivery of said cotton to said Lovell as temporary custodian of said court. Said order provided that said custodian should permit said Latham & Company to substitute for a part of said cotton a forth-coming bond. Said bond was given with the appellee American Surety Company of New York as surety. Said order also provided that said custodian should sell the rest of said cotton and deposit the money in bank in Pensacola where it should remain to abide the final decree of the court. The property was sold and the deposit made. (*Transcript in No. 259, fols. 8–16.*)

July 1. The United States District Court for the Northern District of Florida denied the application of the appellees Westphalen & Company for the impounded cotton that was claimed by them but granted them leave to sue in the United States Circuit Court of that District to recover the same. Thereupon and about July 14, 1910, they brought suit in said Circuit Court against the appellee Lovell as Trustee and said railroad company to recover the same. Thereupon the parties to said suit entered into an agreement pursuant to which said property was delivered to said Lovell as Temporary Custodian thereof and by him sold and the proceeds deposited in bank at Pensacola

to abide the final decree of the court. (*Transcript in No. 260, fols. 6-14.*)

1914.

April 20. The appellants, Knauth, Nachod & Kuhne, filed their amended bills in said District Court for the Northern District of Florida, by leave of court. The Court had previously sustained its jurisdiction by denying motions to quash service. The claim of Knauth, Nachod & Kuhne is set forth in the form prescribed by the present Equity Rules, and as they had intended to amend their bill and set forth their claim to the property that was impounded and sequestered in the Southern District of Alabama, as before stated. It is in substance that part of the property in question in said Northern District of Florida equitably belongs to them. (*Transcript in No. 259, fols. 32-39, 42-43, 45, 47, 103; Transcript in No. 260, fols. 30-36, 38-43, 44-45, 101.*)

1915.

July 10. The United States District Court for the Northern District of Florida, on motions of the appellees, granted the decrees appealed from, dismissing the amended bills of Knauth, Nachod & Kuhne, for want of jurisdiction. The decrees set forth that the proper forum is the bankruptcy court of the Northern District of Alabama. The motions were made on the ground that there was a want of equity as well as a want of jurisdiction of the subject matter. The appellants had filed written objections to said motions on constitutional and other grounds. (*Transcript in No. 259, fols. 79, 83, 85-86, 91, 96-97, 105-106, 112; Transcript in No. 260, fols. 82, 85-87, 92, 95-97, 103-104, 108-109.*)

It is to be noted that said Court obviously felt constrained to follow said decision of said Circuit Court of Appeals and, although no opinion was written except what appears in the decrees, it so stated to counsel.

It should also be noted that said decrees involve the following questions: (1) Whether by impounding the property in question the court below acquired juris-

diction to hear and enforce the rights of the appellants, Knauth, Nachod & Kuhne, or of any other pursuing owners; (2) whether, by presenting the merits of the appellants' bills and the jurisdiction of the court over the subject matter thereof, the appellees did not waive their right to be sued in a particular district; (3) whether the Bankruptcy Act vests the bankruptcy court with exclusive jurisdiction of the claim of the appellants or any pursuing owners when their property has been impounded in the hands of adverse holders by another court in another district and state; and (4) whether the court below, by impounding the property of the appellants and then dismissing their claim of a prior and paramount ownership without a hearing, did not deprive them of their property without due process of law, contrary to Amendment V of the Constitution of the United States.

July 10. The court below allowed appeals to this Court, on the ground that the foregoing questions were involved, pursuant to § 238 of the Judicial Code. (*Transcript in No. 259, fols. 123, 125; Transcript in No. 260, fols. 117, 119.*)

SPECIFICATION OF ERRORS, RULE 21, ¶ 2, SUB. (2).

*First.* The United States Circuit Court of Appeals for the Fifth Circuit erred in merely modifying and then affirming as modified the decree of the United States District Court for the Southern District of Alabama, instead of reversing the same, and in proceeding upon the theory: (1) that the original suit was merely to set aside a preferential transfer and recover a money judgment, whereas it was to recover specific property; (2) that the property in question was *in custodia legis* of the bankruptcy court in the Northern District of Alabama; (3) that *Lazarus* vs. *Prentice* (234 U. S. 263) is an authority that is applicable to this case; (4) that Knauth, Nachod & Kuhne had no place in the original suit, after they had been impleaded as unknown claimants; and (5) that they would not be permitted to intervene and set up the prior and paramount right of pursuing owners of property in the possession of a court of equity.

*Second.* The United States District Court for the Southern District of Alabama erred in dismissing the bill of Knauth, Nachod & Kuhne, for want of jurisdiction, and in proceeding on the theory: (1) that they could not intervene and set up the prior and paramount right of pursuing owners because such right is independent of the claim involved in the original suit; (2) that they were not parties to the original suit, after they had been impleaded as unknown claimants; (3) that their prior and paramount right as pursuing owners was not germane or pertinent to the claim of title and right of possession asserted by the Receivers and creditor and Trustee; (4) that their prior and paramount right as pursuing owners did not attach to the forthcoming bond, the proceeds of their property in possession of the court; (5) that no Federal court would have jurisdiction because it was not granted by the Bankruptcy Act or by the general law respecting parties of diverse citizenship; and (6) that no jurisdiction had been acquired, by the consent of Latham & Company.

*Third.* That the United States District Court for the Northern District of Florida erred in following said decision of said Circuit Court of Appeals, for the reasons above given.

The above errors are set forth more at length in the assignments in the records. (*Transcript in No. 98, pp. 126–130, 143–144; Transcript in No. 259, fols. 117–119; Transcript in No. 260, fols. 111–113.*)

## POINT I.

**The property in question is neither *in custodia legis* nor in any way within the jurisdiction of the United States District Court for the Northern District of Alabama, in Bankruptcy. It had been transferred to Latham & Company and Westphalen & Company, before the bankruptcy of Knight, Yancey & Company, and was held by carriers for them, under a claim of right, when it was impounded and sequestered by the courts at Mobile and Pensacola. Said transfers are not void but merely voidable and must be set aside on statutory grounds before said bankruptcy court will have any jurisdiction thereover.** (*Transcript in No. 98, pp. 5, 47, 70-71; Transcript in No. 259, fols. 42-43; Transcript in No. 260, fols. 38-43.*)

It has been determined that the Trustee in Bankruptcy of Knight, Yancey & Company stands in their shoes and, as such Trustee, has no right to the property until said transfers be set aside on statutory grounds; and also that the burden rests on the Trustee of establishing the conditions that make them voidable.

*Pyle, Trustee*, vs. *Tex. T. & T. Co., 238 U. S. 90, 97-98.*

*Lovell, Trustee*, vs. *Newman, 227 U. S. 412, 421-422, 426.*

*Lovell, Trustee*, vs. *Newman, 192 Fed. Rep. 753, 761; 113 C. C. A. 39. Certiorari denied and appeal dismissed, 227 U. S. 412, 414, 426.*

*Hentz* vs. *Lovell, Trustee, 192 Fed. Rep. 762; 113 C. C. A. 48. Appeal dismissed, 231 U. S. 738.*

The jurisdiction of the bankruptcy court depends on its jurisdiction over Knight, Yancey & Company. By its officer, the Trustee, it succeeded to their possession and right of possession. Its jurisdiction does not extend to property held adversely, particularly property held under transfers that are merely voidable, at most. The test is possession or right of possession. Jurisdiction of property held adversely must be acquired by consent or plenary suit, even where the property is within the district.

*Bankruptcy Act, §§ 60b, 70a (5).*

*In re Rathman, 183 Fed. Rep. 913, 927; 106 C. C. A. 253. Cited in Jones* vs. *Springer, 226 U. S. 148, 155.*

*In re Gill, 190 Fed. Rep. 726, 728; 111 C. C. A. 454.*

*Jaquith* vs. *Rowley, 188 U. S. 620, 623-624, 625-626.*

*First Nat. Bank* vs. *Chicago Title & Trust Co., 198 U. S. 280, 289, 290, 290-291, 292.*

*Babbitt* vs. *Dutcher, 216 U. S. 102, 113.*

*Hebert* vs. *Crawford, 228 U. S. 204, 208-210; and cases cited.*

The right to avoid preferences on statutory grounds is in derogation of the common law right of tranferees, in commercial transactions, and is not to be extended beyond the clear import of its terms.

*Fitzgerald* vs. *Quann, 109 N. Y. 441, 445.*

*Thompkins* vs. *Hunter, 149 N. Y. 117, 123.*

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."
>
> *Shaw* vs. *Railroad Co., 101 U. S. 557, 565.*

By the provisions of the Bankruptcy Act above cited, the judgment or decree of a court of competent jurisdiction is necessary to deprive transferees of their property and to vest the same in the bankruptcy court. This evinces both an established policy and also a due regard for the limitations upon the power of Congress. The

power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States", in Article I, § 8 of the Constitution of the United States, is subject to the provision of Amendment V, that no person shall "be deprived of life, liberty or property without due process of law." If, therefore, Congress had ever assumed authority to deprive Latham Company of their title to the property in question, except by the judgment or decree of a court of competent jurisdiction, such an act would be unconstitutional and void.

> "Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law."
>
> *Cooley's Const. Lim. (7th Ed.) 518.*

> "'It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of an individual without his consent and give it to another?'"
>
> *People* vs. *O'Brien et al., 111 N. Y. 1, 58-59.*
>
> *Wilcox et al.* vs. *Consolidated Gas Co., 212 U. S. 19, 44.*

The case of *Lazarus, Michel & Lazarus* vs. *Prentice, Receiver of Musica* (234 U. S. 263) quoted by the court below, is radically different from the suit at bar. It was a motion to dismiss an appeal to this Court, for want of jurisdiction. The interveners asserted merely an assignment, on account of attorney's fees, after a receiver of the property had been appointed in New York and the receivership extended by ancillary proceedings in New Orleans, where possession of the property was obtained. Of course, after the property had vested in the court through its receiver, the bankrupts had nothing to assign and the right of the interveners, if any, was merely to an allowance in the course of administration, as provided by the Bankruptcy Act. The Court merely held that they should present their claim to the court of original jurisdiction and that the appeal should be dismissed. It pointed out, however, the distinction between cases of that character and plenary suits concerning property claimed by others than the bankrupts. (Page 268.)

## POINT II.

**If the bankruptcy court were ever vested with the title and custody of the property in question, because of the adjudication of bankruptcy, it ceded jurisdiction of the proceedings in question to the courts at Mobile and Pensacola.** (*Transcript in No. 98, pp. 7, 14-16; Transcript in No. 259, fols. 8, 11-13, 41; Transcript in No. 260, fols. 7, 9-12, 38-43.*)

It is common practice, when a court of equity acquires the custody of property, by a receiver or otherwise, to authorize a claimant whose right is disputed to bring an action or suit to recover the same from the receiver or other officer, in any court of competent jurisdiction. In this way, a constitutional right to trial by jury is preserved.

*Walling* vs. *Miller, 108 N. Y. 173, 177, 178.*
*Matter of C. J. Co., 128 N. Y. 550, 553.*
*Fidelity Trust Co.* vs. *Gaskell, 195 Fed. Rep. 865, 869-874; 115 C. C. A. 527.*

We shall see, in our next point, that the consent of the bankruptcy court is not necessary to the maintenance of a suit against a Trustee, to recover property in his possession, but its consent was granted in the suits at bar.

## POINT III.

**Knauth, Nachod & Kuhne had the right to invoke the aid of any other court of competent jurisdiction, even if the property in question had been in the custody of the bankruptcy court.**

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts are open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

*Eyster* vs. *Gaff*, 91 U. S. 521, 525.

"The bankrupt law makes no distinction between different kinds of liens, whether by mortgage, judgment or otherwise. If they have been acquired *bona fide* and are recognized by the State law, they have the same priorities and dignity as though no proceedings in bankruptcy had taken place."

*Reed* vs. *Bullington*, *49 Miss. 223, 225.*

"The first contention of the appellant is that the state court had no jurisdiction of the cause of action, because the fund was in the possession of the bankrupt court. We think it had jurisdiction of an action to determine and establish the plaintiff's lien. It is settled by the decision of the Supreme Court of the United States in *Bardes* v. *Hawarden Bank* (178 U. S. 524), that the bankrupt court, except by the consent of the parties, has not jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the state courts or in the Circuit Court of the United States, if the citizenship of the parties authorizes the action to be maintained in the latter tribunal. (See also, *First Nat. Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280.) While it is not so certain that that rule obtains in its full integrity as to a suit brought against trustees in bankruptcy, we think it was the intention of the Bankrupt Act to allow adverse claimants to property or parties claiming liens to establish their rights by suits in courts of plenary jurisdiction and not to subject such claims to summary disposition in the bankrupt court, unless it may be when the claims are frivolous or made in bad faith. * * * Of course, we do not mean to assert that under the judgment of the state court the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law. It may also be that the bankrupt court could have enjoined the prosecution of this action, but it has not done

so. Apparently, it has invited the plaintiff to assert his claim by a plenary suit in a court of general jurisdiction, and we may assume that the bankrupt court will give effect to any judgment recovered therein."

*Skilton* vs. *Codington*, *185 N. Y. 80, 84-85, 85-86.*

"In the latter case [Skilton *vs.* Codington] the Court of Appeals by Cullen, C. J., in sustaining the jurisdiction of the state court, admirably expounds the applicable principles, with a full citation of authorities. That was a suit against the trustee, while the present case was brought by the trustee."

*Frank* vs. *Vollkommer*, *205 U. S. 521, 529.*

"The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the State vested him with."

*Hiscock* vs. *Varick Bank of New York*, 206 U. S. *28, 41.*

"It was the intention of the bankruptcy law to allow adverse claimants to property, or parties having liens, to establish their rights by suits in courts of plenary jurisdiction and not to subject them to summary disposition in the bankruptcy court unless when the claims are frivolous or made in bad faith."

*In re Rathman, 183 Fed. Rep. 913, 928; 106 C. C. A. 253.* Cited in *Jones* vs. *Springer*, *226 U. S. 148, 155.*

"The action brought by the trustee in bankruptcy, [to set aside a fraudulent transfer and which resulted in a fund sought to be impressed with a trust] pursuant to the powers vested in him by this section [§ 70, B'k'y Act] was not in hostility to the title or rights of the plaintiff, but in subordination to the same. * * *

* * * it was proper for the plaintiff to institute a suit in equity * * * and assuming, as we must, that the sum received by the trustee in bankruptcy, in compromise of the judgment recovered by him, declaring the conveyance of the bankrupt to Cavanaugh fraudulent, stood in place of the property, which might have been reconveyed to the

trustee in bankruptcy, she would be entitled to have restored to the trust such portion of that fund as she was able to successfully follow into the purchase money paid by the bankrupt, or into the funds in the hands of the trustee in bankruptcy. * * *

The plaintiff must be permitted to follow, if she can, her trust moneys into the hands of the trustee in bankruptcy, he having no greater right against her than the bankrupt, her trustee, possessed had he remained solvent.

The other creditors of the bankrupt have no claim upon any of the funds derived from plaintiff's trust which can be fully identified.

To the extent that plaintiff is able to follow the trust funds into the purchase price of the real estate, or into the bankrupt's estate generally, she points out moneys that are no part of the estate held by the bankrupt's trustee for general distribution among the creditors, and is entitled to have them restored to the trust for her benefit which is to continue during her life."

*Welch* vs. *Polley*, *177 N. Y. 117*, *121*, *122*, *123*.
Reversing *86 App. Div.* 260.

So far as the foregoing may differ from the rule that obtains in courts other than bankruptcy, in suits and proceedings for the application or disposition of particular property, it rests securely on principles of public policy that inhere in § 23 and other provisions of the Bankruptcy Act.

**The case under review is not only in conflict with the principles established by the above but also with the following decisions, the last of which questions its soundness, to wit:**

*Fidelity Trust Co.* vs. *Gaskell*, *195 Fed. Rep. 865*, *869-874*; *115 C. C. A. 527*.

*Lyttle* vs.. *Nat. Surety Co.*, *43 App. Cases, D. C.*, *136*, *140*, *141*, *141-142*, *142*, *144*. (*1915.*)

*De Friece* vs. *Bryant*, *232 Fed. Rep. 233*, *236-240*.

## POINT IV.

**The original suits at Mobile and Pensacola were not merely *in personam*, to set aside a voidable transfer and recover a money judgment. They were *in rem*, to impound and sequester and obtain delivery of the property in question.** (*Transcript in No. 98, pp. 8, 15, 16; Transcript in No. 259, fols. 8, 11; Transcript in No. 260, fols. 7, 10-11.*) **Said relief required exclusive dominion. This vested the courts with an exclusive jurisdiction and imposed the duty to hear and enforce the rights of all claimants.**

*Krippendorf* vs. *Hyde, 110 U. S. 276, 280, 282, 287.*

*Morgan's La. and Tex. R. R. and Steamship Co.* vs. *Tex. Cent. Ry. Co., 137 U. S. 171, 201.*

*Farmers Loan & Trust Co.* vs. *Lake Street Elevated R. R. Co., 177 U. S. 51, 61.*

*Murphy* vs. *John Hoffman Co., 211 U. S. 562, 569.*

*Palmer* vs. *Texas, 212 U. S. 118, 129.*

*Rickey Land and Cattle Co.* vs. *Miller & Lux, 218 U. S. 258, 262-263.*

In addition to relief requiring an exclusive dominion, which is the test of an exclusive jurisdiction, the Courts at Mobile and Pensacola impounded and sequestered the property. Clearly no other Court was open to Knauth, Nachod & Kuhne and, if there had been a subsequent failure of jurisdiction of the original suits, it would not have divested said courts of jurisdiction to hear and enforce their rights or those of any other pursuing owner.

* * * "I am satisfied that it is the duty of the court to take cognizance of the intervening petitions above referred to and to determine the

validity of the claims therein asserted and, if found valid, to give them due effect by affording the petitioners appropriate relief. If no question had arisen in regard to the jurisdiction of the court over the principal case, there could be no doubt whatever of the right of the interveners to apply to this court, it having possession and control of the property upon which the liens and claims rest, for the relief to which they were entitled. The fact that there was a latent infirmity in the jurisdiction, arising from the unlawful conduct of the parties in instituting the suit, does not, in my opinion, change the result. * * * It is the fact of the actual possession which the court has taken, and that alone, which gives to the intervener his right to appear and be heard and to have his rights ascertained and awarded to him."

*Electrical Supply Co.* vs. *Put-in-Bay Waterworks, Light & Ry. Co., 84 Fed. Rep. 740, 742.*
*Fidelity Trust Co.* vs. *Gaskell, 195 Fed. Rep. 865, 869-870, 871-874; 115 C. C. A. 527.*

In addition to the above, unknown claimants which included Knauth, Nachod & Kuhne, had been impleaded in the suit at Mobile and called upon to present their claim to the property in question to the court. (*Transcript in No. 98, pp. 22-23, 35.*) It is submitted that this vested the Court with jurisdiction to hear and enforce the rights of Knauth, Nachod & Kuhne as pursuing owners.

In addition to all of the above, the Court at Mobile had permitted Knauth, Nachod & Kuhne to intervene and file their cross bill or whatever it should be called. (*Transcript in No. 98, pp. 35, 37-38, 60.*) If the court had a discretion to deny leave to intervene, it did not exercise it and, being duly admitted to the case, Knauth, Nachod & Kuhne had the same right to have their claims heard and enforced as if they had been named as defendants in the original suit.

"In the case at bar the trial court had taken possession of all of the property * * * The Steel Company * * * was obliged to intervene * * * It could not go anywhere else. The court did permit" intervention and the issue of process

and * * * "There should be a full and fair hearing on the petition presented."

*Ill. Steel Co.* vs. *Ramsey, 176 Fed. Rep. 853, 863, 866; 100 C. C. A. 323.*

"In respect of any matter within the scope of the intervention, the petitioner had thereby become an actor, with liberty to present its contention and obtain an adjudication."

*In re Mich. Cent. R. R. Co. 124 Fed. Rep. 727, 730; 59 C. C. A. 643.*

*Credits Commutation Co.* vs. *United States, 177 U. S. 311, 315-316.*

The original suits were *in rem*. Neither the complainants nor the defendants resided in the Southern District of Alabama. The original suit was brought in the Circuit Court under § 23 of the Banpruptcy Act and the Act of August 13, 1888 (25 St. at L. 434), prescribing the jurisdiction of said court and continuing § 8 of the Act of March 3, 1875 (18 St. at L. 472). The jurisdiction depended on the fact that the property was within the district.

*Greeley* vs. *Lowe, 155 U. S. 58, 73-74.*

**The fact that Knauth, Nachod & Kuhne are pursuing owners of the property impounded and sequestered by the courts at Mobile and Pensacola and their rights, therefore, are prior and paramount to the interest of the parties to the original suits only emphasizes the principle that they are entitled to have their claim heard and enforced.**

"TAFT, Circuit Judge, * * * care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. * * * In other words, the relation between the two suits is principal and ancillary only so far as that, without possession of the *res* in the former suit, the court would have no jurisdiction of the latter; but, having thus acquired and thus maintaining its jurisdiction in

the second suit, the court proceeds in it without further regard to the pleading or course of the principal action. * * * The motions to dismiss * * * are denied."

*Continental Trust Co. et al* vs *Toledo, St. L. & K. C. Railroad Co., et al, 82 Fed. Rep. 642, 645-646.*

*Toledo, St. L. & K. C. Railroad Co. et al* vs *Continental Trust Co. et al, 95 Fed. Rep. 497, 505; 36 C. C. A. 155.*

## POINT V.

**The sale of a part of the property in question and the deposit of the proceeds and, what is the same thing, the deposit of the value or forthcoming bonds for the other parts transferred the rights of all claimants to the value and bonds in in the possession of the courts at Pensacola and Mobile.**

We have shown that the bankruptcy court had no jurisdiction of the property in question because it was held adversely but, whether it had or not, the courts at Mobile and Pensacola had impounded and sequestered the property and the bankruptcy court had not claimed a right to withdraw it. In fact, it had authorized the suits. (*Transcript in No. 98, pp. 7, 14-16.*) The property was perishable because the market might break and its value depreciate. A good title had to be granted or the full value would not be paid or deposited. These circumstances warranted said courts in either selling the property free of all claims or, what is the same thing, accepting a deposit of the value or a forthcoming bond therefor. This transferred the rights of all claimants to the proceeds, whether money or forthcoming bonds, in the possession of said courts.

"The very reason of the rule that permits a good title to be given by an authority that has none con-

tradicts the limitation supposed. [*i. e.*, that only the bankruptcy court could direct a sale, although the territorial court held the property under an attachment against the bankrupt.] We are of opinion that the power of the territorial court remained. 'For necessity (which is excepted out of the law) the sale in that case is good.' 2 Inst. 168. The proceeding is *in rem.* against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place."

*Jones* vs. *Springer, 226 U. S. 148, 156-157.*

*First Nat. Bank of Chicago* vs. *Chicago Title & Trust Co., 198 U. S., 280, 291.*

*Fidelity Trust Co.* vs. *Gaskell, 195 Fed. Rep. 865, 869-874; 115 C. C. A. 527.*

## POINT VI.

**Apart from the fact that unknown claimants had been impleaded when the value and forthcoming bonds were deposited in Court** *(Transcript in No. 98, pp. 22-23),* **the law, which authorized a pursuing owner to intervene and reclaim the proceeds of his property, entered into and constituted a part of the proceedings and subjected the deposits to that right, whether the same were in money or forthcoming bonds.**

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

*Von Hoffman* vs. *City of Quincy, 4 Wall. 535, 550.*

*Liverpool & Gt. Western Steam Co.* vs. *Phœnix Ins. Co., 129 U. S. 397, 447-448, 448, 456, 458, 459, 461.*

*El Paso & S. W. R. R. Co.* vs. *Eichel & Weikel, 226 U. S. 590, 597.*

## POINT VII.

**By impounding and sequestering the property of the petitioners-appellants and then substituting deposits of value and forth-coming bonds therefor, the courts below have deprived them of their property and, if they have no adequate right to reclaim the proceeds, it is without due process of law.** (*Transcript in No. 98, pp. 126–127; Transcript in No. 259, fol. 105; Transcript in No. 260, fol. 103.*)

The Fifth Amendment of the Constitution applies to the judicial as well as the executive and legislative departments of the government.

> *Chicago, B. & Q. R. R. Co.* vs. *Chicago, 166 U. S. 226, 233–235.*

The test, whether a Federal court has power to impound and sequester property without jurisdiction to hear and enforce the rights of a pursuing owner, is to be determined not by what has been done in this case but what may be done in any case.

> "The question is to be determined not by what has been done under it in any particular instance, but what may be done under and by virtue of its authority"
>
> *Colon* vs. *Lisk, 153 N. Y. 188, 194.*
>
> *Truax* vs. *Raich, 239 U. S. 33, 39, 42–43.*

There can be no power to impound and sequester property which does not carry with it the power to hear and enforce the r ghts of a pursuing owner because it will contravene the constitution and, therefore, cannot exist. Of course, all powers are subject to constitutional rights. The courts below held that they have no jurisdiction to hear and enforce the rights of Knauth, Nachod & Kuhne. It is submitted that, if this be so, they had no power to impound and sequester their property.

The far fetched suggestion that Knauth, Nachod & Kuhne may resort to the bankruptcy court is not only unsound, as we have seen, but it ignores the prior and paramount character of their rights. They are pursuing owners of particular property. Suppose that they had filed their bills in the bankruptcy court, the Trustee would have answered that the property was in litigation at Mobile and Pensacola; and Latham & Company and Westphalen & Company would not have appeared and no decree could be rendered against them. It would not be a local action, because the property would not be there.

To sustain the right to impound and sequester property, a pursuing owner must be entitled to have his ownership heard and enforced as a matter of right and not of favor.

*Coe* vs. *Armour Fertilizer Works, 237 U. S. 413, 425, 426.*

## POINT VIII.

**By challenging the merits of the bills of complainants below, the defendants submitted to the jurisdiction. If any Federal court would have had jurisdiction, therefore, the defendants waived any right they may have had to be sued in a particular district.** ***(Transcript in No. 98, pp. 100, 110, 114, 118; Transcript in No. 259, fols. 83, 91, 97; Transcript in No. 260, fols. 85, 95.)***

*Thames and Mersey Marine Ins. Co., L'l'd* vs. *United States, 237 U. S. 19, 24-25.*

The motions attacked the bills on many grounds but were granted for want of jurisdiction. They were not to strike out redundant matter or for a better statement of claim. They were to dismiss the bill. When the bill at Mobile was drawn, it was expected that Latham & Company would want a complete showing and that the Trustee would want all claims presented in one suit, the

evidence being likely to be about the same in each case and unknown claimants being impleaded. It was when technical objections were raised, in that suit, that Knauth Nachod & Kuhne went to Pensacola and started the suits there. If the decrees under review be reversed, the bill in the suit at Mobile will be amended so as to cover only the sequestered cotton. The bills in the suits at Pensacola follow the present Equity Rules.

## POINT IX.

**The right of the petitioners-appellants to follow their money into the property in question and have a trust or charge impressed on it for their benefit, is well established.**

*3 Pom. Eq. Juris. (3d Ed.) Secs. 1044, 1048, 1051, 1053, 1058.*

*Gorman* vs. *Littlefield, 229 U. S. 19, 24;* and cases cited.

*Zartman, Trustee in Bankruptcy* vs. *First Nat; Bank of Waterloo, 216 U. S. 134, 138.*

*Oliver* vs. *Piatt, 3 How. 333, 401.*

*Smith* vs. *Township of Au Gres, Mich., 150 Fed. Rep. 257, 260; 80 C. C. A. 145.*

*Lightfoot* vs. *Davis, 198 N. Y. 261, 270-273, 274, and cases cited.*

*Welch* vs. *Polley, 177 N. Y. 117, 121, 122, 123.*

*Southern Cotton Oil Co.* vs. *Elliotte, 218 Fed. Rep. 567, 572,* and cases cited; *134 C. C. A. 295.*

*In re Leavitt & Grant, 215 Fed. Rep. 901; 132 C. C. A. 139.*

*Knauth, Nachod & Kuhne* vs. *Lovell, 212 Fed. Rep. 337, 338,* and cases cited.

*Title Guarantee & Trust Co.* vs. *Haven, 214 N. Y. 468, 487.*

The analogy between the cases above and the suit at bar is complete. In the *Elliotte* case the borrower had paid for cotton seed with the proceeds of money advanced for that purpose but failed before performing his agreement to ship the same to the lender; and equity, in effect, impressed a trust or charge on the mass of seed with which the same had been mingled, to the extent of said advances. In the *Leavitt & Grant* case, brokers had wrongfully pledged securities of their principals; and equity, in effect, impressed a trust or charge on surplus assets in the hands of the pledgee by reinstating the pledgee's lien on the proceeds of the securities and its right of set-off against deposits and subrogating said principals thereto. In the *Haven* case the trust company was induced by forgery to pay taxes on real property; and equity, in effect, impressed a trust or charge thereon by reinstating a tax lien and subrogating the trust company thereto. The above cases proceed, as should the suit at bar, on the following principle:

> "I think there should be no doubt that the plaintiffs' case is safely within the equitable doctrine that, where the just and clear rights of a party to payment of a debt from a particular fund can be secured in no other way, the fund, or its proceeds, will be regarded as a trust for his better, security. (See Vail *v.* Foster, 4 N. Y. 312, 314.) * * * I think, under the circumstances surrounding the negotiation of the sale of the draft to the plaintiffs, that the defendant took over the moneys, in question, as a fund charged with a trust for its application to their claim and that the general creditors have no equal right thereto."
>
> *Muller* vs. *Kling*, *209 N. Y. 239, 244, 245.*

In the suit at bar, the bankrupts obtained the money of Knauth, Nachod & Kuhne by fraud, perpetrated by means of forged bills of lading, and utilized the same in the redemption and purchase of the property in question. As against the bankrupts, do not the "just and clear rights" of said claimants require that the "fund or its proceeds * * * be regarded as a trust for their better security" and "as a fund charged with a trust

for its application to their claim"? The Trustee and Latham & Company and Westphalen & Company all stand in the shoes of the bankrupts and "have no equal right thereto".

Knauth, Nachod & Kuhne are the real parties in interest and entitled to maintain their suits on their own behalf. The bankrupts, who were parties to the original suit at Mobile, might also have maintained the same in the right of Knauth, Nachod & Kuhne, as trustees *ex maleficio* for their benefit.

*First Nat. Bank of Patterson, N. J.* vs. *Broadway Bank in the City of New York, 156 N. Y. 459, 467-468.*

*National Bank* vs. *Insurance Co., 104 U. S. 54, 70, 71.*

*Wetmore* vs. *Porter, 92 N. Y. 76, 82, 84, 85.*

The bankrupts received the money of Knauth, Nachod & Kuhne by their broker and deposited it in the First National Bank of Decatur by payment thereof to its correspondent in New York. *Qui facit per alium, facit per se.* The title to the currency drafts, by which remittance of said money was effected, remained in the bankrupts until applied to the purchase and redemption of the cotton in question. (*Transcript in No. 259, fols. 29, 35-39; Transcript in No. 260, fols. 27, 33-36; Transcript in No. 98, pp. 64, 67, 68, 69.*)

*Beal* vs. *City of Sommerville, 50 Fed. Rep. 647, 649-650, 651, 652; 1 C. C. A. 598.*

*Richardson* vs. *Louisville Banking Co., 94 Fed. Rep. 442, 448; 36 C. C. A. 307.*

*St. Louis & S. F. Ry. Co.* vs. *Johnston, 133 U. S. 566, 573-574, 575, 575-576.*

## POINT X.

**The decrees under review should be reversed with costs and the cases remanded to the United States District Court for the Southern District of Alabama and the Northern District of Florida respectively to be tried and determined on the merits.**

Respectfully submitted November 10, 1916.

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Nos. 98–259–260.

# Supreme Court of the United States.

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| KNAUTH, NACHOD & KUHNE, *Petitioners,* *vs.* LATHAM & CO. *et al.* | No. 98. October Term, 1916. Certiorari to Circuit Court of Appeals for the Fifth Circuit. |
| MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE), *vs.* WILLIAM S. LOVELL, AS CUSTODIAN, ETC., *et al.* | No. 259. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida. |
| MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE) *vs.* MAURICE E. A. WESTPHALEN *et al.* | No. 260. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida. |

## BRIEF AND ARGUMENT FOR WILLIAM S. LOVELL, AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ONE OF THE RESPONDENTS IN No. 98 AND ONE OF THE APPELLEES IN 259 AND 260.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Nos. 98–259–260.

# Supreme Court of the United States.

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| KNAUTH, NACHOD & KUHNE, Petitioners, vs. LATHAM & Co. *et al.* | No. 98. October Term, 1916. Certiorari to Circuit Court of Appeals for the Fifth Circuit. |
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| MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE), vs. MAURICE E. A. WESTPHALEN *et al.* | No. 260. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida. |

## BRIEF AND ARGUMENT FOR WILLIAM S. LOVELL, AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ONE OF THE RESPONDENTS IN No. 98 AND ONE OF THE APPELLEES IN 259 AND 260.

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## Statement of the Case.

By order of this Court the three cases are to be heard together. All of the cases grow out of the bankruptcy of Knight, Yancey & Company, a firm doing business at Decatur, Alabama. This firm was adjudged bankrupt in the District Court of the United States for the Northern District of Alabama on April 20, 1910. Two receivers of their estate, Clarence E. Frost and William S. Lovell, were immediately appointed, and on May 26, 1910, William S. Lovell, appellee, was appointed trustee of said bankrupts.

There were at Mobile, Alabama, and at Pensacola, Florida, large quantities of cotton in process of shipment abroad, to which said receivers and afterwards the trustee of the bankrupts laid claim on behalf of the bankrupt estate. The cotton at Mobile was about to be loaded on a ship, the *Meltonian*, and that at Pensacola was in the possession of the Lousiville & Nashville Railroad. The cotton at Mobile was claimed adversely to the trustee in bankruptcy by Latham & Company, of Havre, France, and that at Pensacola was so claimed partly by said Latham & Company and partly by Westphalen & Company, also of Havre, France. Both Latham & Company and Westphalen & Company claimed to be purchasers from Knight, Yancey & Company of the portions of the cotton claimed by them respectively. Under the rulings of the Circuit Court of Appeals, Fifth Circuit, they were such purchasers.

*Lovell, Trustee*, v. *Newman*, 192 Fed. 753.

Immediately after the adjudication in bankruptcy, the receivers and a creditor of the bankrupt estate filed a bill in equity in the Circuit Court of the United States for the Southern District of Alabama, at Mobile, against Latham

& Company and others, the object of which bill was to enjoin the removal of the cotton at Mobile above referred to from the jurisdiction of the court, and to set aside what was charged to be a preferential transfer thereof made by the bankrupts to Latham & Company shortly before the bankruptcy (Record in No. 98, page 3). The Circuit Court granted a temporary injunction restraining the removal of said cotton, and ordering it seized, on certain conditions, Record No. 98, page 17, and thereupon, upon the petition of Latham & Company, the adverse claimants of said cotton, they were permitted to give bond which appears on page 28 of the record in case No. 98, and to take the cotton. After this bond was given, Knauth, Nachod & Kuhne sought to be made parties to this litigation at Mobile (Record in No. 98, pages 33, 35, 60, 61), claiming, broadly speaking, that they had been defrauded of certain money by the bankrupts, Knight, Yancey & Company, and that this money could be traced into undefined portions of the cotton, the subject matter of the litigation between the receivers and trustee (he being substituted as a party for the receivers) of Knight, Yancey & Company and Latham & Company. Said Knauth, Nachod & Kuhne appeared in this litigation at Mobile by a pleading called by them a cross-bill. Upon the motion of said William S. Lovell, Trustee in Bankruptcy, this cross-bill was stricken from the files. The opinion of the District Judge striking it is at page 102 of the record in case No. 98. From this order of dismissal Knauth, Nachod & Kuhne took an appeal to the Circuit Court of Appeals for the Fifth Circuit, by which court the order of the District Court was reversed and the case remanded, 200 Fed. Rep. 403. The opinion of the Circuit Court of Appeals seems to proceed on the idea that the motion to strike was not the proper pleading by which to

obtain a dismissal. On the remandment of the case, upon motion to dismiss for want of equity, etc., the District Court dismissed the cross-bill, 211 Fed. Rep. 374. The last mentioned decree of dismissal was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 219 Fed. Rep. 721.

Upon the petition of Knauth, Nachod & Kuhne, the Supreme Court granted its writ of *certiorari* to the Circuit Court of Appeals for the Fifth Circuit to review the case.

For convenience of statement the case above described, No. 98, will be referred to as the Mobile case.

Proceeding now with a description of the litigation brought by appeal from the District Court for the Northern District of Florida, Nos. 259 and 260: Immediately after the appointment of the receivers of Knight, Yancey & Company, they, together with a creditor of the bankrupt estate, instituted proceedings in the District Court of the United States for the Northern District of Florida, the object of which was to prevent the removal of the cotton at Pensacola, Florida, which was claimed to be assets of the bankrupt estate, and which cotton was in the possession of the Louisville & Nashville Railroad Company. A temporary injunction was issued by the District Court of the United States for the Northern District of Florida, restraining the Louisville & Nashville Railroad Company from disposing of the cotton. As stated, this cotton at Pensacola was claimed on the one hand by the receivers and trustee in bankruptcy of Knight, Yancey & Company and on the other hand in part by Latham & Company and in part by Westphalen & Company. Accordingly, suit was instituted in what was then the Circuit Court of the United States for the Northern District of Florida by the trustee in bankruptcy of Knight, Yancey & Company against

Latham & Company and the Louisville & Nashville Railroad Company, charging that a certain lot of the cotton in the possession of the Railroad Company had been preferentially transferred by the bankrupts to Latham & Company prior to the bankruptcy, and that it was recoverable by the trustee. The only account of this litigation brought at Pensacola, Florida, by the trustee in bankruptcy against Latham & Company is contained in the amended bill of Knauth, Nachod & Kuhne against William S. Lovell, No. 259 in this court. According to the amended bill of Knauth, Nachod & Kuhne (Case No. 259, Record, pages 4-5), there were two lots of this cotton. By order of the Circuit Court Latham & Company were permitted to take one lot of this cotton upon giving bond, and likewise under court order, the other lot was sold by William S. Lovell, trustee in bankruptcy, and the proceeds of the cotton deposited in the First National Bank of Pensacola, Florida, to abide the decree of the court.

After this disposition of the cotton, Knauth, Nachod & Kuhne filed an original bill in the District Court of the United States for the Northern District of Florida which contained in substance the same averments as were contained in the so-called cross-bill filed by them in the litigation at Mobile; that is to say, they again set up that they had been defrauded by the bankrupts of $98,005.58 shortly prior to their bankruptcy, and that they could trace the money out of which they were so defrauded into an undefined portion of the cotton which had been claimed on the one hand by the trustee in bankruptcy of Knight, Yancey & Company and on the other hand by Latham & Company. For convenience this suit will be referred to herein as the suit between the trustee in bankruptcy and Latham & Company at Pensacola. Defend-

ants, Lovell, Trustee, Latham & Company, and the surety on the bond last referred to, American Surety Company of New York, moved the court to dismiss this bill of Knauth, Nachod & Kuhne, and the motion was granted, and from this order the appeal No. 259 is taken.

The other case, No. 260, arose in this way: The remainder of the cotton at Pensacola not claimed adversely to the trustee in bankruptcy by Latham & Company was so claimed by Westphalen & Company. Westphalen & Company filed their bill in the Circuit Court of the United States for the Northern District of Florida at Pensacola against said Lovell as trustee in bankruptcy and the said Louisville & Nashville Railroad Company, setting up that the cotton so claimed by Westphalen & Company was in fact their cotton and was not assets of the bankrupt estate. The cotton the subject matter of this litigation was by the agreement of the parties to it, that is to say, Lovell as trustee on the one hand, and Westphalen & Company and the Louisville & Nashville Railroad Company on the other hand, sold, and the proceeds deposited in bank at Pensacola, Florida, to abide the result of the litigation. This disposition of the cotton was made by agreement of the parties to the case and not by order of court (Record, No. 260, page 4). After this was done Knauth, Nachod & Kuhne filed their original bill in the District Court of the United States for the Northern District of Florida against the trustee in bankruptcy, Westphalen & Co., and the Louisville & Nashville Railroad Company, which bill was substantially the same as the cross-bill filed by them in the litigation at Mobile and substantially the same as the original bill filed by them at Pensacola against the Trustee in Bankruptcy and Latham & Company. This bill of Knauth, Nachod & Kuhne was on the motion of the trus-

tee in bankruptcy and of Westphalen & Company dismissed by the District Court, and from this decree of dismissal this appeal is taken.

Summarizing the above statement, the court will observe that there was a suit of the trustee in bankruptcy of Knight, Yancey & Company at Mobile, Alabama, against Latham & Company seeking to recover certain cotton which was claimed to have been transferred preferentially by the bankrupts to Latham & Company, and that Knauth, Nachod & Kuhne sought to appear in this litigation and assert that they had a title to the subject matter of the litigation paramount to either that of the trustee or of Latham & Company. They appeared at Pensacola, Florida, by two original bills which referred to the litigation instituted by the receivers and trustee of the bankrupts at Pensacola, Florida. One of these original bills referred to the litigation between the trustee in bankruptcy of Knight, Yancey & Company on the one hand and Latham & Company on the other, and set up that Knauth, Nachod & Kuhne had a paramount title to that of either the trustee in bankruptcy or Latham & Company to the cotton which in the first instance was the subject matter of that litigation. The other original bill of Knauth, Nachod & Kuhne brought by them at Pensacola, Florida, set up an alleged similar paramount title in Knauth, Nachod & Kuhne to the cotton which in the first instance was the subject matter of the litigation in the suit at Pensacola, Florida, in which Westphalen & Company were plaintiffs and Lovell as trustee in bankruptcy defendant.

All three of these proceedings brought by Knauth, Nachod & Kuhne were brought after the cotton which had been seized in the several suits or proceedings instituted by the receivers and trustee in bankruptcy of Knight, Yancey & Company had been disposed of in litigation

between the trustee in bankruptcy on the one hand and the adverse claimants thereof on the other.

Neither the cross-bill of Knauth, Nachod & Kuhne in the suit at Mobile nor either of the original bills brought by them at Pensacola sought to identify the cotton into which Knauht, Nachod & Kuhne charged in general terms their money went. These pleadings were identical in their general averments with a fourth suit brought by them against the trustee in bankruptcy of Knight, Yancey & Company in the District Court of the United States for the Northern District of Alabama, that being the court in which the bankruptcy proceedings were pending. The insufficiency of this last mentioned bill is pointed out by Grubb, District Judge, in his opinion on a motion to dismiss the case,

*Knauth, Nachod & Kuhne* vs. *Lovell*, 212 Fed. Rep. 337.

The manner in which Knauth, Nachod & Kuhne were defrauded is the same as that employed by the bankrupts on their other creditors. (Answer of Lovell, Trustee; Record, No. 657, page 24; Lovell *vs.* Newman, 192 Fed. 753; Hentz *vs.* Lovell, 192 Fed. 762; Borden & Haac *vs.* Lovell, 203 Fed. 234.)

None of the bills filed by Knauth, Nachod & Kuhne specify into what assets of the bankrupt estate or into what other property the money of the pleaders went. In this connection the attention of the court is particularly called to the prayers of the several bills, to Paragraph 16 of the cross bill filed in case No. 98, appearing at pages 69-70 of the record in that case, and to the 21 schedules attached as exhibits to that cross bill which appear at pages 76-96 of the record, and to the captions at the commencement of each of these twenty-one schedules. The mere fact that these schedules embrace property according

to the valuations placed opposite the several items of many times over the amount of Knauth, Nachod & Kuhne's losses, as well as the vague phraseology employed in the captions to the several schedules to describe the interest of Knauth, Nachod & Kuhne in the property therein embraced, show that there is no effort at particularizing the property which they claim to be theirs.

In case No. 259 the following excerpt from the bill in that case (paragraph 7, page 13) shows that there is no effort in that case to specify the cotton into which Knauth, Nachod & Kuhne claim their money went:

> "After said First National Bank of Decatur had received said moneys, including the moneys of said Knauth, Nachod & Kuhne, the same were all disbursed by said bank, at the instance of said Knight, Yancey & Company, in the purchase and redemption of certain cotton, *including a part of the cotton or the bills of lading therefor* set forth in Schedule 1 and Schedule 2 hereto annexed. Said Schedule 1 and Schedule 2 hereto annexed *include certain cotton or the bills of lading therefor*, exceeding three thousand dollars in value, that was thus purchased and redeemed with said moneys of said Knauth, Nachod & Kuhne."

In case No. 260, the following excerpt from the bill (paragraph 3, page 4, record) reveals a like infirmity to those above referred to:

> "The complainants, Knauth, Nachod & Kuhne, assert an interest *in a part of said cotton or in the proceeds thereof that is prior and paramount both to that of said Westphalen & Company and to that of said Lovell as Trustee.*"

## BRIEF OF THE ARGUMENT.

### I.

In neither of the three cases was there any *res* in the possession of the court which could be made the subject of a decree in favor of Knauth, Nachod & Kuhne. Neither the United States Circuit Court at Mobile nor the United States Circuit Court (afterwards District Court) at Pensacola assumed jurisdiction of the suits between the Trustee in Bankruptcy on the one hand and Latham & Company and Westphalen & Company on the other, for the purpose of administering the subject matter thereof for whomsoever might be interested in it. These suits were plenary suits; they were not proceedings in bankruptcy. They were for the purpose of trying title as between the parties thereto, and only such title as these parties set up. The cottton which Knauth, Nachod & Kuhne charge their money went into had been released before they appeared. They were at liberty to follow it. They were not estopped by anything in the pleadings in these suits from asserting any right or title in the cotton wherever they might find it. They were not entitled to any equitable relief *in personam* against either the Trustee, Latham & Company, or Westphalen & Company. The proceedings were not *in rem*, but were *quasi in rem*. Brown on Jurisdiction, Secs. 59-*a*, 83*a*.

The general rule has thus been stated:

> "On this principle (that a judgment in order to operate as an estoppel, must be rendered pursuant to pleadings involving a contention in settlement of which the judgment is pleaded), where the title or right to property was not directly put in issue in a suit, the judgment concludes nothing in regard to it although the property formed the subject matter

of the suit, and although certain titles or rights of the parties were alleged in the pleadings or tacitly assumed as the basis of the judgment." (23 Cyc., page 1316.)

The above general statement is supported by

*Roberts* vs. *No. Pac. R. R. Co.*, 158 U. S. 1, tenth head-note;
*Cromwell* vs. *Sac County*, 94 U. S. 351;
*Freeman on Judgments*, Sec. 257;
*Humes* vs. *Scruggs*, 64 Ala. 40.

On the cases cited by appellants under their point IV, page 23, appellants' brief, the following comment is made:

In *Kripendorf* v. *Hyde*, 110 U. S 276, the property involved had been taken out of the possession of a third party by attachment; he claimed the property as his own but was not a defendant in attachment; having given bond to have the property forthcoming in the attachment suit, and having subsequently paid the penalty of the bond into Court, he was permitted to propound his title to the attached property by an equity suit involving the money paid into Court.

He had become a party to the attachment suit by giving bond in it for property which had been taken from him.

*Morgan's La. & Tex. R. R., etc., Co.* v. *Tex. Cent. Ry. Co.*, 137 U. S. 171; *Farmers Loan & Trust Co.* v. *Lake St. Elevated R. R. Co.*, 177 U. S. 51; *Palmer* v. *Texas*, 212 U. S. 118, and *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258, were all either foreclosure or receivership cases involving real estate which the several Courts had impounded.

*Murphy* v. *John Hoffmen Co.*, 211 U. S. 562, involved proceedings with reference to property actually in the possession of a Bankruptcy Court for administration.

## II.

While it was charged in the bill of the Receivers at Mobile that unknown persons claimed some right, title and interest in the cotton there sought to be seized, and it was prayed that they be made defendants (record No. 98, page 22), this general averment and prayer could not cut off any such right in the cotton as appellants assert in it since there is no description in the pleadings of any such claim in the cotton as appellants assert nor any reference to them in those pleadings. If the averment had any effect, it could only relate to persons claiming under Latham & Company. (See motion to amend, striking out this averment. Record, No. 98, pages 96-7. Order allowing amendment, page 104.) Appellants-petitioners were never cited by publication or otherwise to appear in the case; they made the averment referred to a pretext for beclouding the case with issues foreign to it.

## III.

While the proceedings at Pensacola were commenced by a proceeding which might be deemed an ancillary one in bankruptcy, the purpose of that proceeding had been accomplished before appellants appeared, and their appearance was in no event in bankruptcy, but by bill in a plenary suit. Lovell's plea in abatement in No. 260, page 29 and the averments of the two bills.

## IV.

The purposes of the cross bill in the suit at Mobile, No. 98, bore no relation to the purposes of the original suit. The objects of the cross bill were to assert a title to the

cotton which was independent of any claim of title relied on by complainants or defendants, and to administer the entire bankrupt estate, including the disposition of suits in other jurisdictions (cross bill, paragraph 16, page 69). Appellants had nothing to offer by way of defense to the original suits. They were not interested in any way in the question of whether a preference had been given or not. Under these circumstances, the cross bill was properly dismissed.

*Providence Rubber Co.* vs. *Goodyear's Ex.*, 9 Wallace 807;
*Ayres* vs. *Carver*, 17 Howard 591;
*Cross* vs. *De Valle*, 1 Wallace 1;
*Dickerman* vs. *Northern Trust Co.*, 80 Federal 450;
*Harrison* vs. *Perea*, 168 U. S. 311.

## V.

The cross bill was aggravatedly multifarious. The effort of the court to inquire into all the subjects set up in it would reduce the litigation to chaos. The court could, under the circumstances, have dismissed the bill of its own motion.

*Oliver* vs. *Piatt*, 3 How. 333, 412.

## VI.

It is immaterial that the Trustee did not ask the court to annul its order giving appellants leave to file their amended cross bill in No. 98. As a matter of law, that order pre-supposed that the amended cross bill would be

such as might properly be filed. In addition, the court gave the leave subject to such objections as might be made by adverse parties. The order pre-supposed that the amended cross bill would be a proper pleading, and upon its developing that it was not, the court might dismiss it without putting the Trustee to a motion.

*Dickerman* vs. *Northern Trust Co.*, 80 Fed. 450; 25 C. C. A. 549.

## VII.

The same rules that apply to a cross bill should apply to the analogous proceedings brought by appellants at Pensacola. These proceedings seek to fasten themselves on the suits between the Trustee and Latham & Company and the Trustee and Westphalen & Company. But they are in no sense germane to those suits.

## VIII.

Petitioners-appellants had no lien on the bankrupt estate for their losses. Nor did they point out into what cotton or other property or assets their money went. For this reason if for no other their bills were properly dismissed.

*In re See*, 209 Fed. 172 (C. C. A. 2d Cir.).

*Board of Commissioners* vs. *Strawn*, 157 Fed. 49; 84 C. C. A. 553; 15 L. R. A. (N. S.) 1100.

*In re Brown*, 193 Fed. 24, 30; 113 C. C. A. 348; affirmed First Nat. Bank *v.* Littlefield, 226 U. S. 110.

*Knauth, Nachod & Kuhne* v. *Lovell*, 212 Fed. 337.

*Empire Surety Co.* v. *Carroll County*, 194 Fed. 593; 114 C. C. A. 435.
*Re McIntyre*, 185 Fed. 96; 108 C. C. A. 543.
*Lowe* vs. *Jones*, 192 Mass. 94.
*Schuyler* vs. *Littlefield*, 232 U. S. 707.

## IX.

Substantially the same bill filed by petitioners here was filed by them in the New York State Courts with reference to losses sustained by them under the same circumstances that they here set up and the bill was held to be without equity.

*Jaffe* vs. *Weld*, 132 N. Y. Supplement 505; affirmed by Appellate Division, 139 N. Y. Suppl. 1101; affirmed by Court of Appeals, 102 N. E. 1104.

## X.

Under the motions made the bills could be dismissed under Equity Rule 29.

*Victor Talking Machine Co.* vs. *Strauss*, 230 Fed. 449.
*Central Trust Co.* vs. *Denver, etc., R. R. Co.*, 219 Fed. 110–113;
*Wilson* vs. *American Ice, etc., Co.*, 206 Fed. 736.

## XI.

Whether the reasons given by the District Court for the Northern District of Florida and the Circuit Court of Appeals for the Fifth Circuit for dismissing the bills were correct or not, they should have in any event been dismissed on other grounds and appellants cannot complain.

It is respectfully submitted that the decrees appealed from should be affirmed and the writ of *certiorari* dismissed.

Respectfully submitted,

AUGUSTUS BENNERS,
Attorney for William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Appellee and Respondent.

Birmingham, Alabama, November 17, 1916.

# Supreme Court of the United States

OCTOBER TERM, 1915.

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*No. 657.*

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MAX JAFFE AND OTHERS, COMPRISING THE FIRM OF KNAUTH, NACHOD & KUHNE,

**Appellants,**

***versus***

MAURICE E. A. WESTPHALEN AND OTHERS,

**Appellees.**

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## BRIEF ON BEHALF OF MAURICE E. A. WESTPHALEN AND OTHERS, APPELLEES.

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### SYLLABUS.

1. A bankruptcy adjudication brings to the Court making it the property of the bankrupt wherever situated, placing the property in *custodia legis*, with full right of the Court to administer the estate.

2. Where an ancillary suit is brought in a different jurisdiction by a bankrupt's trustee, to recover alleged assets of the bankrupt and transfer them to the proper Court for administration, adverse claimants may not intervene and impress a trust in their favor on such alleged assets.

3. Where alleged assets of a bankrupt are sought to be sequestered in an ancillary suit brought by the bankrupt's trustee, and are, by agreement between the trustee and the defendant, sold and converted into money, the Court in which the ancillary suit is brought has no jurisdiction of a bill, whether original or by intervention, subsequently filed on behalf of adverse claimants who seek to impress a trust upon such alleged assets, the proper forum for relief sought being the bankruptcy court of original jurisdiction.

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## BRIEF STATEMENT OF THE PROCEEDINGS.

This case comes here on appeal from a judgment of the District Court for the Northern District of Florida, sustaining a motion to dismiss the amended bill of complaint for want of jurisdiction of the subject-matter of the litigation and for the reason that "the proper forum for the relief sought by the complainants is the bankruptcy court for the Northern District of Alabama." (Rec., p. 36.) The appeal is taken direct to this Court on the ground that the jurisdiction of the trial Court is in issue, and that the case involves the construction and application of the Constitution

of the United States and the constitutionality of certain laws of the United States.

The issues here involved are substantially the same as those presented in **No. 420, "Knauth, Nachod & Kuhne vs. Latham & Co.,** and in **No. 656, "Max Jaffe vs. Wm. S. Lovell,"** reported in **219 Fed. 721,** both of which cases are brought here on writ of error and consolidated with this case on motion of appellant.

Both the Circuit Court of Appeals, in **219 Fed. 721,** and the trial Court in this case (Rec., p. 36) based their judgment on the want of jurisdiction.

The motion to dismiss the bill of complaint of appellant was based on both the want of jurisdiction and the want of equity in the bill, and contains ten grounds upon which appellees rely, which will be found in the record, at page 30. In so far as the question of want of jurisdiction is concerned, the following is a brief statement of the allegations of the motion on that subject:

1. The bill regarded as a bill of intervention is not in subordination to or in recognition of the propriety of the suits of respondents (Westphalen & Co.) against the defendant (Lovell, Trustee), nor are the purposes of the bill germane to those of the suit of those respondents against said trustee.

2. The bill may not be maintained as an original bill because at the time this suit was brought there was no personal jurisdiction of the Court over these respondents, nor of the defendant, Lovell, as trustee; nor was the property the subject-matter of the suit within the Court's jurisdiction or in its custody.

3. Prior to the filing of this bill, the cotton constituting the subject-matter of the suit of Westphalen & Co. against Lovell, Trustee, had by agreement between Westphalen & Co. and Lovell, Trustee, been sold and the proceeds thereof deposited in banks at Pensacola to abide the result of the litigation between Westphalen & Co. and Lovell, Trustee, and for no other purpose. Neither the cotton nor the proceeds thereof were ever impounded or in any sense in the custody of the Court in which the bill of complainants was filed. None of the property referred to was within the jurisdiction of the Court at the time the suit was brought. The bank deposits referred to, in so far as the situs thereof is concerned, followed the residence of the depositors, which was not within the jurisdiction of the Court. The respondents, Westphalen & Co., were and are residents of France, and Lovell, Trustee, was and is a resident of Alabama. The administration of the bankrupt estate was and is now pending in the Northern District of Alabama. Neither Westphalen & Co. nor Lovell, Trustee, have been served, or can properly be served, with process to answer this bill. The banks in which the deposits were made have not been made parties defendant.

All of the facts upon which the motion to dismiss is predicated appear affirmatively in the bill of complaint.

## ARGUMENT.

### I.

The adjudication of bankruptcy in the District Court for the Northern District of Alabama brought the property of the bankrupts wherever situated into *custodia legis*, and that Court thus acquired the full right to administer the estate.

In a similar case (**Lazarus vs. Prentice, 234 U. S. 266**), the Court, speaking through Mr. Justice Day, said:

> "The filing of the petition and adjudication in the bankruptcy court of New York brought the property of the bankrupts wherever situated in *custodia legis*, and it was thus held from the date of this filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law." Citing—
>
> **Mueller vs. Nugent, 184 U. S. 1.**
>
> **Acme Harvester Co. vs. Beekman Lumber Co,. 222 U. S. 300.**
>
> See also:
>
> **White vs. Schloerb, 178 U. S. 542.**
>
> **Bryan vs. Bernheimer, 181 U. S. 188.**

II.

The appellant, therefore, had no right to intervene in an ancillary suit instituted by the trustee to set aside a preferential transfer. If they are entitled to impress a trust upon any assets of the bankrupts in the hands of the trustee, no good reason appears why they should not proceed in the court of original jurisdiction. The sole object of the ancillary suit by the trustee is to collect assets of the bankrupt and transfer them to the proper court for administration, and the proper forum to secure recognition of a lien upon said assets or to "impress a trust" thereon is in the bankruptcy court.

## III.

Regarded as an original bill, the motion to dismiss is well founded, because at the time the bill was filed there was no personal jurisdiction of the Court over the respondents, nor was the property, the subject-matter of the suit, within the Court's jurisdiction or in its custody.

The litigation over the cotton started by a petition in behalf of Lovell & Frost, Receivers, *et al.*, in an ancillary bankruptcy proceeding, in which the Court granted an injunction order restraining the Louisville and Nashville Railroad Company from moving or in any way disposing of any cotton in its possession or under its control upon shipments by or for account of Knight, Yancey & Co. The defendants, Westphalen & Co., then filed a petition for the release of certain cotton described in a schedule annexed to the petition. Both Lovell and the Louisville and Nashville Railroad filed objections to the return of the cotton, which the Court maintained, but granted Westphalen & Co. permission to institute suit to recover the same. Thereupon Westphalen & Co. instituted suit by a bill of complaint in equity against the trustee and the Louisville and Nashville Railroad Company to establish their title, ownership and right of possession to the particular cotton claimed by them. Thereafter, by consent of Westphalen & Co., Lovell and the railroad, the said cotton was delivered to Lovell, as temporary custodian, and sold, and the proceeds deposited in two banks in Pensacola to the joint credit of Lovell, Trustee, and of Westphalen & Co. Thereafter, and for the first time, the appellants, Knauth, Nachod & Kuhne, filed their bill of complaint herein, by which they seek to "impress a trust" upon the cotton. The defendants,

Westphalen & Co., Lovell, Trustee, and the Louisville and Nashville Railroad Company, were made parties defendant. The two banks holding the deposits were not made parties.

It is manifest that the Court has no personal jurisdiction over the defendants, Westphalen & Co., as they were and are citizens and residents of France, and are not represented in this country by anyone authorized to accept service. The defendant, Lovell, Trustee, is a resident of Alabama, and the Court likewise had no jurisdiction over him. The defendant, Louisville and Nashville Railroad, was made party, but at the time the bill was filed did not have possession of the cotton which had been delivered by consent to Lovell, Trustee, and sold. The railroad company therefore had no interest in the controversy.

It is likewise clear that the Court had no jurisdiction over the cotton. The railroad company, it is true, had been restrained from surrendering the cotton, but subsequently the cotton, by consent of the party who secured the injunction, was taken from its possession, was delivered to Lovell, Trustee, and was then sold and converted into money. The deposit of the funds to the joint credit of Lovell and Westphalen & Co. in the Pensacola bank does not give this Court jurisdiction, because the situs of the deposits followed the residence of the depositors which was not within the jurisdiction of the Court. Finally, neither of the said banks were made parties defendant to the bill, and are in no sense before the Court. The cotton having been sold and converted into money, and the banks not having been made parties, there is, consequently, no property within the jurisdiction of the Court.

We respectfully submit, therefore, that, whether regarded as a bill of intervention or as an original bill, the

Court has no jurisdiction either over the persons of the defendants or of the subject-matter of the bill, and that the proper forum of the action brought by appellants is the bankruptcy court of original jurisdiction, and that the judgment appealed from be affirmed.

HENRY P. DART,
E. C. MAXWELL,
HENRY P. DART, JR.,
*Of Counsel for Appellees.*

# KNAUTH, NACHOD & KUHNE *v.* LATHAM & COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

# JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, *v.* LOVELL, AS CUSTODIAN, &c., AND AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ET AL.

# JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, *v.* WESTPHALEN ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Nos. 98, 259, 260. Submitted November 13, 1916.—Decided January 8, 1917.

A bill seeking to impress a trust upon personal property belonging to a bankrupt's estate, upon the theory that it was procured by means of moneys of which the plaintiff was defrauded by the bankrupt, must trace such moneys by adequate averments into the specific property sought to be affected.

Claimants seeking priority of payment from a bankrupt's estate upon the ground that moneys obtained from them fraudulently by the bankrupt went into his business and swelled the estate, must go to the bankruptcy court in which the estate is being administered; such claims are not adjudicable in suits for the recovery of the bankrupt's property in other jurisdictions.

219 Fed. Rep. 721, affirmed.

THE cases are stated in the opinion.

*Mr. Julien T. Davies, Mr. Thomas M. Stevens, Mr. W. H. Watson* and *Mr. George T. Hogg* for petitioners and appellants.

*Mr. Walker B. Spencer* and *Mr. Charles Payne Fenner* for Latham & Company *et al.*

*Mr. Augustus Benners* for Lovell.

*Mr. Henry P. Dart, Mr. E. C. Maxwell* and *Mr. Henry P. Dart, Jr.*, for appellees in No. 260.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

NUMBER 98.

Knight, Yancey and Company were duly adjudged bankrupts in the District Court, Northern District of Alabama, April 21, 1910. A few days later, in conjunction with a firm creditor, the receivers brought suit in the United States Circuit Court, Fifth Circuit, Southern District of Alabama, against Latham and Company, a French partnership, Frederick Leyland Steamship Company, Limited, Louisville & Nashville Railroad Company and others, seeking to recover 4200 bales of cotton about to be exported from Mobile, upon the ground that while insolvent the bankrupts had transferred it to Latham and Company in payment of prior indebtedness and with intent to prefer them. After being taken into possession by the United States Marshal, by order of court, the cotton was released, May 14, 1910, to Latham and Company, who executed a bond conditioned, "Now, therefore, if the obligors herein shall have forthcoming and deliver within sixty days from date of any final decree of this court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises, then this obligation shall be null and void, otherwise to

remain in full force and effect." Later the trustee in bankruptcy was substituted as complainant.

July 1, 1910, Knauth, Nachod and Kuhne filed in the cause a so-called cross bill, subsequently amended, which on motion was dismissed both for want of equity upon its face and because the court lacked jurisdiction to entertain it. The Circuit Court of Appeals affirmed this action.

The amended cross bill is a mass of prolix and vagrant statements and allegations from which it is difficult to spell out any very definite theory. Apparently because $98,000—approximate market value of 1300 bales of cotton—had been fraudulently obtained from Knauth, Nachod and Kuhne by the bankrupts and used by them in their business, the former sought to impress a trust upon what the latter thereafter acquired, including the 4200 bales of cotton found at Mobile.

The allegations of the bill are wholly inadequate to trace the funds into any specific cotton, *Peters* v. *Bain*, 133 U. S. 670, 693; and the cross bill must be regarded as an attempt to secure from the estate priority of payment on account of money fraudulently obtained by the bankrupts and put into their business. Manifestly such a proceeding could not be entertained in the Southern District of Alabama. The estate was being administered in another court. *Mueller* v. *Nugent*, 184 U. S. 8; *Jones* v. *Springer*, 226 U. S. 153; *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S. 300; *Lazarus* v. *Prentice*, 234 U. S. 267; *Jaffe* v. *Weld*, 208 N. Y. 593.

The judgment of the Circuit Court of Appeals is

*Affirmed.*

NUMBER 259.

The record contains the amended bill of complaint; motions to dismiss with objections thereto; final judgment of dismissal for want of jurisdiction; assignment of errors, etc.

Shortly after Knight, Yancey and Company were adjudged bankrupts, upon application of the receivers (May, 1910), the United States District Court, Northern District of Florida, enjoined the Louisville and Nashville Railroad from removing or disposing of 3600 bales of cotton in its possession at Pensacola; and in June thereafter the duly selected trustee instituted suit seeking to recover possession of the cotton upon the ground that it had been transferred with intent to prefer. By the court's direction 2635 bales were thereafter delivered to Latham and Company who claimed them as owners, a forthcoming bond having been given. The remainder—965 bales—was sold and proceeds deposited in the First National Bank of Pensacola to await final orders.

Subsequently appellants instituted an original proceeding claiming that the bankrupts had fraudulently obtained from them $98,000 and invested it in this or other cotton or otherwise, and that they were entitled to impress a trust upon the avails of such funds.

The involved and erratic allegations are wholly inadequate to show with sufficient definiteness that the funds were invested in the cotton at Pensacola; and the bill must be considered as an attempt to secure priority of payment out of the bankrupts' estate upon the theory that it was increased by appellants' money. There was no jurisdiction to entertain such a proceeding in the District Court in Florida; and the judgment below is accordingly

*Affirmed.*

NUMBER 260.

The record also consists of the amended bill, filed April 20, 1914; motions to dismiss with objections thereto; final judgment of dismissal for want of jurisdiction; assignments of error, etc.

At the instance of the receivers of Knight, Yancey and

Company, May, 1910, the Louisville and Nashville Railroad was enjoined by the United States District Court, Northern District of Florida, from removing or disposing of 1950 bales of cotton then in its possession at Pensacola, Florida, and claimed by Westphalen and Company. Afterwards that firm instituted an original suit to recover, pending which, under agreement, the cotton was sold and the proceeds deposited in two banks at Pensacola subject to final judgment. The proceedings were substantially the same as in Number 259 and like action was taken by the court. The judgment below is

*Affirmed.*